Chapter XXXIV.

GENERAL ELECTION CASES, 1884 AND 1885.

1. Cases in the Forty-eighth Congress, section 984–999.[1]

984. The election case of Manzanares v. Luna, from the Territory of New Mexico, in the Forty-eighth Congress.

As to what constitutes a sufficient service of notice of contest when the returned Member is absent from home.

Instance wherein the census and returns of previous elections were referred to as creating a presumption against a return.

It being impossible to separate the good from the bad vote, the poll was rejected.

On March 5, 1884,[2] Mr. Thomas A. Robertson, of Kentucky, submitted the report of the Committee of Elections in the case of Manzanares *v.* Luna, from the Territory of New Mexico.

Sitting Delegate had been returned by an official majority of 1,419 votes.

At the outset of the case the committee thus dispose of a preliminary question:

That on the 29th day of November, 1882, the acting governor of the Territory of New Mexico issued his certificate of election in due form to the sitting Delegate; that on the 23d day of December, 1882, the contestant served a copy of his notice of contest on the wife of the contestee at his residence in the Territory of New Mexico, the contestee not being found at home; that on the 20th day of December, 1882, the contestant sent a copy of his said notice of contest by express to the Sergeant-at-Arms of the Senate of the United States to be served on contestee, and on the same day sent by mail, by a registered letter, another copy addressed to contestee, directed to the city of Washington, where contestee was then in attendance upon the session of Congress. That the contestee answered in full on the 29th day of January, 1883.

The contestee claimed that the notice was not served in time, but your committee are of opinion that the notice was ample, and served in time, and in accordance with the statute law of New Mexico; and for the further reasons that the sheriff who served the notice of contest upon contestee's wife testified contestee was absent from the Territory of New Mexico, and besides he mailed a registered letter containing notice of contest to contestee at the city of Washington, where contestee was, and that the letter reached the city within the time prescribed by law for the notice to be served.

[1] Other cases in this Congress are classified in different chapters: Chalmers *v.* Manning, Mississippi, Volume I, section 44; Garrison *v.* Mayo, Virginia, Volume I, section 537.

[2] First session, Forty-eighth Congress, House Report No. 667; Mobley, p. 61.

As to the merits of the case, the committee investigated chiefly questions of fact. As to these frauds the report holds:

In the county of Valencia your committee think it is clearly proven that frauds were committed in several of the precincts, and were such as to compel your committee to throw out the whole vote of said precincts; the fraud being so great and the returns so entirely in disregard of law and fair conduct on the part of the election officers that it is impossible to separate the good from the bad vote.

Before going into any detail of the evidence, your committee will state that the census of 1880 shows the whole number of male adults capable of voting in that county to be 2,636, while the vote certified and counted for contestee is 4,193. Moreover, while the certificate from that county gave the contestee that remarkable vote, it did not give even one to the contestant, although the returns before them showed he had received 66 votes. Your committee deem it appropriate to refer the House to the vote for Delegate in Congress of the two political parties in this Territory from 1873 to 1882, inclusive.

The committee, after citing the returns, say:

These are very pregnant evidences of fraud, taken in connection with the evidence, which shows no increase of population from 1880 to 1882.

The report then examines the various precincts, and finds an actual majority of 938 for contestant. Therefore they recommended the following resolutions:

Resolved, That Tranquilino Luna was not elected a delegate to the Forty-eighth Congress from the Territory of New Mexico, and is not entitled to the seat he now holds.

Resolved, That Francisco A. Manzanares was duly elected a Delegate to the Forty-eighth Congress from the Territory of New Mexico, and is entitled to be sworn in as such.

The resolutions were agreed to, without debate or division.[1]

985. The Virginia election case of O'Ferrall v. Paul, in the Forty-eighth Congress.

Instance wherein a contest was maintained and contestant seated, although the returned Member had resigned before taking his seat.

Payment of a capitation tax being a prerequisite for voting, the votes of persons who had not paid were rejected.

Instance wherein the number of disqualified voters was fixed by testimony of a single witness as to his mere comparison of poll lists with delinquent tax lists.

Instance wherein the vote of a disqualified voter was proven by the fact of his color.

Instance wherein the House rejected votes as disqualified without ascertaining the names of the voters or the precincts wherein they voted.

A report of a committee is sometimes authorized by the affirmative votes of less than a majority of the whole committee, some Members being silent or absent.

On April 30,1884,[2] Mr. Robert Lowry, of Indiana, from the Committee on Elections, submitted the report of the majority of the committee in the Virginia contested case of O'Ferrall *v.* Mr. Paul had been credited with an official majority of 205 votes, and had received the certificate. But he never qualified and sent his resignation to the governor in August, 1883, on being appointed to the bench of the United

[1] Journal, p. 747.

[2] First session Forty-eighth Congress, House Report No. 1435; Mobley, p. 137.

States court. No special election having been ordered, the seat had been vacant from the first.

In Virginia the payment of a capitation tax was a prerequisite to the right to vote. The majority of the committee, finding as they claimed, that in one county of the district 557 persons who had not paid the capitation tax had voted for contestee, arrived at the conclusion that contestant was elected:

We base our conclusion that 676 votes were cast by persons delinquent in the payment of their capitation taxes in Albemarle for contestee, and that 557 of these were clearly illegal, upon the following facts:

By section 57, chapter 33, of the Code of Virginia, the commission of the revenue were required to state in their assessment lists the color of all male inhabitants over the age of twenty-one years. The treasurer, in making his return of delinquents to the auditor of public accounts, gave the color of all delinquents in accordance with the commissioners' books. So that the white delinquents were classified in one list and the colored in another list.

The contestant filed certified copies of the delinquent lists (white and colored) of Albemarle County. (Record, 75–91.)

These lists showed the names and color of all delinquents for the year 1881—the year for which the capitation tax was required to be paid before the day of the election in question.

There is contention between the parties as to whether the auditor of public accounts of Virginia could appoint certain collectors of delinquent taxes, and whether these collectors and their deputies could then legally collect these delinquent capitation taxes.

Assuming for the purposes of this case that the auditor of public accounts could appoint collectors of delinquent taxes, and that these collectors could appoint deputies (both of which questions are held in reserve), then, under the law, the clerks of the county and corporation courts of the Commonwealth and the special collectors appointed by the auditor and their deputies were the only parties by whom receipts could be issued for delinquent capitation taxes in the various counties and cities.

The principal question on which we rest this case is, whether certain tax receipts issued by these collectors (so-called) and their deputies were issued without being paid for.

The contestant, to show the number of receipts issued and to whom by both the clerk of Albemarle and special collector, filed a certified list of the names of delinquents for 1881, to whom receipts had been issued by the clerk of Albemarle County. (See Record, 73–75.)

After thus ascertaining the names of these parties who had clerk's receipts, it followed as a necessary consequence that all delinquents who voted whose names were not on the clerk's list, voted on the collector's receipts. Then to ascertain what delinquent voters cast their votes, and upon whose receipts, it was only necessary to compare the poll books of the county with the delinquent lists.

Contestant introduced a witness (Record, 71) who testified—and whose testimony remained uncontradicted—that he had compared the clerk's list with the poll books and had designated all the delinquents who voted on the clerk's receipts by the letters "H. B. B." opposite their names on the delinquent lists; that he then designated all the delinquents who voted and who did not have the clerk's receipts by the name of the precinct at which they voted opposite their names on the delinquent lists. It was thus found that 676 delinquents voted who did not have the clerk's receipt, and presuming that the judges of election did their duty and required the production of receipts, as required by law, these 676 voted on the collector's receipts. Of this number 655 were colored.

James T. Wayland, a strong and active partisan of the contestee, was appointed a special tax collector of delinquent taxes for Albemarle County by the auditor of public accounts, who belonged to the same party as the contestee, and was a State canvasser of that party. This special tax collector appointed persons whom he called deputies in said county; he issued unlimited numbers of blank receipts for delinquent capitation taxes to these so-called deputies, who were all partisans of the contestee, and these deputies filled these receipts without receiving any money, and delivered them to the voters. These deputies paid no money to the collector for the receipts at any time, either before or after the election; the collector only received, and that in bulk, without being applied to individual cases, for all the receipts issued by him, $125 before the day of election. Each receipt issued represented $1.05, so that,

even assuming that this $125 was a valid payment for so many receipts, the said sum of $125 only paid for 119 receipts. There were 676 votes cast upon the receipts issued by this special collector, so that after deducting said 119 receipts there were 557 votes cast upon collectors' receipts for which no money had been paid at the time the votes were cast or before the day of election, as required by the constitution of Virginia, and therefore these 557 votes were illegal.

The system of appointing these special collectors was inaugurated for political purposes by the auditor of public accounts of the State, who belonged to the party of which the contestee was the nominee; all of his appointees were active partisans of his party, and in many instances the chairman or secretary of the county committee, or a member of the State committee of that party, or an United States internal-revenue officer.

After quoting testimony, the majority report goes on:

This evidence shows as conclusively as circumstantial evidence could well show that the colored vote was cast with almost perfect unanimity for the contestee, and when it is taken in connection with the fact that 655 colored delinquents voted on collectors' receipts issued only to Readjuster voters, the conclusion naturally follows that these 655 colored delinquents voted for contestee.

What is proof? It is that degree of evidence which convinces the mind and produces belief.

Can any reasonable mind in the light of this evidence fail to believe that these votes were cast for contestee? Is not the weight of evidence on the side of the contestee? In fact, does it not exclude even a reasonable doubt?

There is no evidence nor any attempt to controvert this, and is not that another circumstance which goes to strengthen the belief? In the case of Smith *v.* Shelley the last House held that the testimony of two witnesses that 95 to 97½ per cent of the colored vote of a Congressional district was Republican was sufficient in the absence of controverting testimony. Here are 21 witnesses, of both political parties and both colors, who were present at the polls, working in the interest of the respective candidates, or observing as interested parties the movements, actions, and expressions of the voters, and with a knowledge of their political affiliations and associates, who testify that the colored vote of a county (not a Congressional district) was cast with approximate unanimity in a certain direction and for a particular candidate. It was not mere opinion, as in the case of Smith *v.* Shelley, but facts drawn from direct observation and participation at the polls, and from knowledge of political proclivities and associations.

Our conclusion is that these 557 persons had not complied with this constitutional provision, and were not therefore qualified to vote, and their votes must be deducted from the vote of the contestee. How, then, will the vote stand?

Returned vote for contestant, O'Ferrall	.....	11,941
Returned vote for contestee, Paul	12,146	.....
Deduct the illegal votes above	557	.....
		11,589
Majority for contestant, O'Ferrall	.....	352

But in this county Porter's precinct was thrown out by the board of county commissioners for mere irregularity. We think it ought to be counted. It gave contestee 104 majority. Deduct, then, 104 from 352, and it leaves a clear majority of 248 votes for contestant.

Therefore the majority reported resolutions declaring that Mr. Paul was not elected, and that Mr. O'Ferrall was elected and entitled to the seat.

Mr. Samuel H. Miller, of Pennsylvania, presented the views of the minority, assailing this conclusion. At the outset he stated the following:

The resolutions appended to the report of the Committee on Elections, submitted by Mr. Lowry, of said committee, received the approval, by a yea and nay vote, of 6 members out of 12 present at the time the vote was taken—2 members present declining to vote. Of the absent members, all 3 had expressed themselves opposed to the resolutions declaring Mr. O'Ferrall elected and entitled to the seat. We state this as showing that at the time said resolutions were adopted by the committee they only had the endorsement of 6 of the 15 members.

The minority then proceed to assail the method of proof adopted by the majority:

The utter unreliability of this testimony arises from the fact that the witness, Bennett T. Gordon, who testified on page 71 of record, did not pretend to know the parties whose names were on the poll books or on the clerk's list of delinquents. He simply performed a mechanical act, which any member of the committee or the House can do by taking up the two lists, and when he finds a name on the poll lists and a name on the delinquent lists which are the same check it off on the assumption that there could not be two men of the same name in the county.

OVER 6,000 NAMES ON THE DELINQUENT LISTS AND POLL BOOKS.

There are over 2,000 names of colored persons on the delinquent lists of Albemarle County and 4,133 names of white and colored on the poll books. There is no law in Virginia requiring the election officers to keep a record of the color of voters. Then, on the delinquent lists we find numerous instances where the same name is common to a number of persons. We find 3 Charles Burleys; 3 John Browns, Jack Brown, John A. Brown, and John W. Brown; 5 Nelson Browns; 4 James Johnsons and 1 Jim Johnson; 4 Wm. Johnsons; 5 Hy. Johnsons and 1 Henry Johnson; 3 Sam. Johnsons and 2 Saml. Johnsons, and an almost equal repetition is found throughout the alphabet. To assume that a stranger could take two lists, one containing over 4,000 names in twenty different books, and the over 2,000 names in two lists, neither of which have any distinguishing marks, and from these 6,000 names select the number of colored persons who voted on delinquent tax receipts and figure them out at 655 is to assume an impossibility. It is not pretended that the election officers kept a record of either the whites or blacks who voted on delinquent tax receipts. The proof is utterly unreliable. In short, it is no proof whatever, for, as heretofore stated, any member of the committee can take the lists and the twenty poll books and as correctly arrive at the same conclusion.

We contend that the only reliable and competent evidence would be the testimony of the alleged delinquents, or a sworn copy of the list of such as paid their tax made out by the collector to whom the tax was paid and by whom the receipts were issued. If the latter could not be obtained then the delinquent voters alone could testify correctly. Every man whose name was on the delinquent list and who voted is presumed to have had a tax receipt, and consequently his ballot can not be rejected except upon competent evidence.

It is on the evidence of Bennett T. Gordon, which will be found in the appendix, that the committee find that 655 colored delinquents voted in Albemarle County. The witness Gordon does not pretend that he has any personal acquaintance with any of these 655 men; does not pretend that he has any personal knowledge of whether they were delinquent or not; does not pretend that he has personal knowledge of whether they are colored or not; does not pretend that he has personal knowledge of whether they are the same men or not. All he testifies is that he finds the name of John Brown on the delinquent county list, and the name of John Brown on some poll list for the same county; therefore the two men are one and the same.

FOR WHOM WERE THESE 655 VOTES CAST?

Unless the House adopts the hypothesis of the majority report that Bennett T. Gordon could with absolute certainty pick out from over 6,000 names these 655 voters, then they are unnamed and unknown. But two of all are called, and three others only are identified. But if their identity is established, then there is not a single witness who testifies for whom they severally voted. Twenty-one witnesses, living in 16 of the 20 election precincts, testify as to whom the colored people as a class voted for. In 4 of the precincts, in which 66 of the alleged delinquents voted, there is not a line of testimony as for whom the colored people as a class voted.

But we contend that a still more important question is:

WHAT ARE THE NAMES OF THE 557 VOTERS

who cast the ballots which the majority report declares to be illegal, and which the committee deduct from contestee's vote, and which must be deducted from contestee's vote in order to seat the contestant?

The committee concede that of the 676 persons who it claims voted on collectors' receipts, 119 (of whom 21 were white and 98 colored) were entitled to vote. What are the names of these 119? It

is admitted by the majority report that Collector Wayland had at least $125 before the election, and that this would qualify 119 voters. Who are they? At what precinct did they vote? How many of them voted at Batesville? How many at each of the other 20 precincts? If it is impossible to say who the 119 voters are, how can the committee name the 557 voters whose ballots it deducts from contestee?

Did any court investigating an election case ever reject a ballot for the sole reason that the person casting it had not paid a tax required by law as a prerequisite for voting and deduct it from one of the candidates without naming the voter who cast the ballot? How is it possible to decide that the ballot is illegal unless the name of the person casting such ballot is known?

Can the majority of the committee name the 557 voters whose ballots it deducts from the contestee in order to seat the contestant? Can the contestant name them? Can anyone tell us the number rejected at each of the 20 precincts? If not, why not?

The minority also asserted, as a fact shown by the testimony, that the collector had a draft for the taxes alleged not to be paid, which was indorsed about three weeks after the election.

In the debate it was insisted that as the object of the law was revenue, and as the State had the revenue, the voters who had paid it should not be disfranchised.[1]

The report was debated on May 5,[2] and on that day a resolution proposed by the minority declaring Mr. O'Ferrall not elected was disagreed to, yeas 83, nays 139.

Then the resolutions of the majority were agreed to, ayes 128, noes 73.

Mr. O'Ferrall thereupon appeared and took the oath.

986. The Ohio election case of Wallace v. McKinley in the Forty-eighth Congress.

A report of a committee is sometimes authorized by the affirmative votes of less than a majority of the whole committee, some being absent.

A divided committee once held that canvassers, not having judicial authority, should count votes returned under variations of name in determining prima facie right.

It being determined that contestant had actually been entitled to the credentials, the burden of proof was shifted to the returned Member.

On May 14, 1884,[3] Mr. Henry G. Turner, of Georgia, from the Committee on Elections, presented the report of the majority of the committee in the Ohio case of Wallace *v.* McKinley.

The minority views, presented by Mr. A. A. Ranney, of Massachusetts, called attention to the division in the committee:

The learned chairman of the committee has prepared and shown to us the report which he proposes to make to the House, in behalf of the six members who constituted the majority, voting in favor of the resolutions appended thereto, as against five other members voting otherwise. It is to be regretted that this case proceeded to a vote in committee during the necessary and enforced absence of four of its members. The minority feel it to be their duty, not only to dissent from the majority report and its conclusions, but to assail it, as failing to present the case fully and properly for the determination of the House.

The sitting Member had received his certificate on an official plurality of 8 votes.

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[1] Record, p. 3812.

[2] Record, pp. 3800–3819; Journal, pp. 1178–1181.

[3] First session Forty-eighth Congress, House Report No. 1548; Mobley, p. 185.

As to the question of prima facie right and the burden of proof, the report says:

The State canvassing board, consisting of the governor and secretary of state, treated Jonathan H. Wallace, John H. Wallace, Major Wallace, Wallace, W. H. Wallace, W. W. Wallace, Jonathan Wallace, Maj. Wallace, and J. H. Wallace as distinct persons, and in that way awarded the certificate of election to the sitting Member. Under this treatment of the returns the sitting Member has a plurality over the contestant of 8 votes.

On the argument the concession was made that the votes certified for "Major Wallace," "Wallace," "Jonathan Wallace," "Major Wallace," and "J. H. Wallace," 16 in number, should be counted for contestant. Conforming the figures to this addition, the positions of the parties are reversed, and the contestant has a plurality over the sitting Member of 8 votes on the face of the returns. In this state of the case the burden is cast upon the sitting Member to contest the election of Mr. Wallace. Indeed, there can be no doubt that the certificate of election should have been issued to the contestant, and he should have been the occupant of the seat with its honors and emoluments. Logically, we assign him nunc pro tunc his true position in the controversy, and the onus is shifted to his adversary.

The proof shows that the contestant was the only candidate at the election bearing the name of Wallace, and under the weight of authority we think that the ballots certified to have borne the names John H. Wallace, W. H. Wallace, and W. W. Wallace, 7 in all, in the absence of any other evidence, should be also counted for the contestant.

The minority deny the principles above set forth.

The majority report goes so far as to say that the certificate of election ought to have been issued to the contestant on this account, and proceeds to treat him in advance as duly elected upon the final returns alone. Nothing, in our judgment, can be more clearly erroneous than this finding and statement. It is against every principle and rule of law, and all precedent. It can not be justly denied that, under the laws of Ohio, the State board are merely ministerial officers, invested with no power to meet the parties and hear evidence; and had they attempted to do it, it would have been a clear violation of duty. The precinct officers (the judges of election) had presumably counted the votes in question as cast for different persons, and they had been so returned to the county canvassers, and by them in turn to the State board. The State board had no right or authority to assume that votes for John H. Wallace, Major Wallace, Wallace, W. H. Wallace, W. W. Wallace, Maj. Wallace, and returned as if for different persons, were in fact intended for Jonathan H. Wallace. The State board had no legal authority whatever to hear evidence and determine that issue of fact. If they had, they should not have stopped there, but proceeded to hear other controverted issues of fact.

The board followed the rule uniformly laid down in the decided cases. (McCrary on Elections, secs. 211, 81, 82, 83; 27 Barb., 77; 25 Ill., 328; 4 Wis., 779; 10 Iowa, 212; 22 Mo., 224. Clark *v.* Board, etc., 126 Mass., 282; 64 Maine, 596; 71 Maine, 371; 59 Ind., 152.)

No authority to the contrary can be found, except in cases where the statutes gave the board greater authority than do the statutes of Ohio. The House can go behind the returns and hear evidence and get at the facts which the State board had no power to do.

In this investigation, therefore, we are to assume that contestee rightfully obtained his certificate, and that he has a prima facie title to the seat, with all of the usual presumptions that attach to the same. It is incumbent upon the contestant to overthrow that title and right. If, in attempting to do so, he shows, or it appears otherwise, that contestee got more votes than were counted and returned for him those must be overcome also. If the evidence nullifies any of the votes counted and returned for contestant, he can not have the benefit of them in maintaining his claim of a majority. It is erroneous to assume that the burden shifts from the contestant to the contestee, by proving one item of his claim, which alone considered might change the result.

There was also a question as to an error of 10 votes in the footings whereby sitting Member suffered; but this was denied by the minority, and sitting Member waived the claim.

987. The election case of Wallace *v.* McKinley, continued.

Ballots whereon the name of a candidate was spelled grotesquely, and rejected by the election judges, were counted on oral evidence sustained by a recount after the box had been in illegal custody.

Discussion as to admissibility of oral evidence to contradict a ballot.

Ballots with a different given name, and others with different initials, were counted without proof of intent of the voter.

A vote for "Kinley" was counted for "William McKinley" on proof of voter's intent.

A vote apparently for "Walce," and rejected by the judges as undecipherable, was counted for "Jonathan H. Wallace" on slender evidence.

The House declined to reverse the action of election officers who had returned for "Jonathan H. Wallace" votes cast for "J. Wales" and "Jonathan H. Walser."

Proceeding from the question of prima facie right, the report proceeds with the claims of contestant and of sitting Member. In brief, it may be said that recounts and reexaminations had so resulted as to enable contestant to claim a plurality of 30 votes, while sitting Member proposed to overcome this by showing the illegality of 55 votes alleged to have been cast for contestant. Individual votes being dealt with, a number of principles were involved in important relations to the decision of the case.

(1) The question as to the proper spelling of the name of the candidate.

Besides the variations discussed in the consideration of prima facie right, the majority proposed to count certain ballots found under conditions as follows:

In Fairfield Township, Columbiana County, a number of ballots bearing the surname of the contestant, or some approximation to that name, though improperly spelled, were omitted from the count and were not included in the return. An effort was made to ascertain the number and character of these ballots by a reexamination of the box. Although the persons charged with the custody of the box and the key of the box deny on oath that they had tampered with the box or its contents, it appears that for a short time the box and the key were in the possession of the same person, contrary to the law of the State. An opportunity was thus afforded for casting suspicion upon the integrity of the box. It also appears that on a recount of the ballots, which had been counted and strung and placed in this box, a different result was reached from the result certified by the judges of election.

But from the testimony of the judges of election and others there can be no doubt that at this precinct ballots of the character described were voted at the election and excluded from the count. Carpenter, Democratic judge of the election, in his evidence states the number of these uncounted ballots to have been from 7 to 15. Hum, a Republican judge of the election, in his evidence estimates the number at from 2 to 13, and his impression seems to have favored the latter number. Shields, another Republican judge, in his testimony places the number at 5. Augustine, Republican clerk of the election, states that there were 13 or 14 of these uncounted ballots. And others testify on the subject with more or less variant results. In the box at the recount just mentioned were found 11 ballots for "Major Wallace," "Ma. Wollac", Wolac," "Mag. Wolac," "Wollac," "Wallace," "Woloc," "Mage. Wolac," and "Wolloc." This species of ballots the judges say they rejected from the count. We adopt this number, and think they ought to be counted for contestant.

In Washington Township, Stark County, the judges of election cast out a ballot on which the sitting Member's printed name was erased, and the name "Walce" was written in pencil under the erased name. The reason given by one of the judges for the rejection of this vote was that "it lacked the Christian name or initials." We think it ought to be counted for contestant.

The minority views contend strongly that the custody of the box had not been in accordance with the law of Ohio, and that upon the person offering the box was cast the burden of proof of showing that it was intact. In this case four months had elapsed, and it appeared (and in debate was admitted by the majority) that there were 5 less votes in the box than at the time of the official count. The minority say:

The majority report virtually abandons the claim as based upon the recount, and appears to find that the evidence establishes, independently of the recount, that 11 more votes were cast for him than were counted. A careful examination shows that the evidence falls far short of proving this. The mixing up of the recount, when it is discredited, with what evidence is furnished by witnesses orally, is most remarkable. The oral evidence alone is not enough to prove distinctly the claim, either as to the number of the ballots not counted or to give an intelligible description of them.

As to the ballots for "Waiac," "Ma. Wllac" "Mag. Wolac," "Walor," "Mage Wolac," and "Waloe," and others (if proved), they neither indicate the proper name of contestant nor any name by which he was ever known.

The oral testimony describes no such ballots.

The judges of election made no return of such, as scattering or otherwise. Whereas if it was true that there were so many such irregular votes, as is now pretended, they would have been returned as was done at other places, in the county of Columbiana, and as the statute absolutely required. It is more probable that they are mistaken now than that they were guilty of any such misconduct.

To count them in any event for the contestant involves a contradiction of the ballots, they having been cast for names different from any by which the contestant has ever been known.

It seems perfectly well settled that no evidence can be received to contradict a ballot; it must be sufficiently certain upon its face, that when read in the light of the surrounding circumstances it appears to be manifestly for the candidate claiming it.

The minority then quote Cooley and Cushing in support of this doctrine.

The minority further discuss on their merits other questions as to ballots bearing variations in the names.

We now come to the 23 names returned from Columbiana County, which contestant claims and which the majority report finds. Upon the evidence that he was a candidate and was known and went by the name of Major Wallace and Jonathan Wallace, contestee very liberally concedes him 16 of the votes, and we need not discuss that matter.

As to 7 ballots, reading:

W. H. Wallace	2
John H. Wallace	4
W. W. Wallace	1
Total	7

There is no ambiguity, and the names designate other persons. There is no evidence to show the intention of the voter, as in case of the ballot for "Kinley." It is not safe to go into the region of guess, surmise, or conjecture. The intention can beagot only from the ballots themselves. There were other Wallaces in the district eligible to the office. There was a John Wallace. There was &good deal of scratching and independent voting, by Republicans especially. When this is done, third persons, not regular candidates, are often voted for. There were in fact some four different candidates at least, and numerous scattering votes, the names not being given.

We can not allow these ballots as proved to have been cast for contestant.

MOUNT UNION PRECINCT, STAR COUNTY.

The majority report allows contestant 1 vote not counted at Mount Union. The ballot is in evidence, marked Ex. A, A. L. Jones. An inspection of the same shows that it is impossible to read more than the first three letters, which are probably W-a-l. Beyond this it is impossible to decipher any letters. It is printed in the record "Walce." It is written in pencil under name of contestee erased in pencil. (Rec., p. 97.)

The judges, including Rakestraw, Democratic judge, were unanimously of the opinion at the time that the name could not be deciphered, and rejected the ballot at the time of the count. In his evidence he now pretends that it was because the initials were wanting. But the evidence of the other witnesses (entirely ignored by the chairman in his report) completely refutes this pretense now. We find that this should not be allowed for contestant with all the presumptions against it, and upon the evidence.

An opportunity to examine the same further, and call witnesses about this ballot, was denied contestee and his counsel, as already herein before stated. (Rec., p. 98.)

This would have been a good occasion for the chairman to have applied the principle, which he enunciates, as to the force which is to be given to the action of the election officers, and on this case "refuse to reverse their judgment."

There was also cast a ballot marked "Kinley," and it was conceded that this should be counted for sitting Member.

The minority also call attention to the following:

In Mount Union precinct, Washington Township, a ballot was cast for "J. Wales," which was counted and returned for Mr. Wallace. The name is not that of the contestant by any possible manner of spelling. It is a well-known name in Stark County, the proof showing that a gentleman of this surname was once a candidate for Congress in the district.

To count the vote for him contradicts the ballot.

In Osnaburgh precinct of Osnaburgh Township a ballot for Jonathan H. Walser was counted and returned for Mr. Wallace. The proof shows that there was a John Walser in Stark County, a prominent Democrat and candidate for office. In any event, the name Walser is not that of the contestant. If intended for him it was a mistake of the voter, which can not be corrected. (A. Smith, Rec., p. 361; M. Miller, p. 363; G. Holben, p. 364; B.F. Sullivan, p. 365.)

There is no evidence adduced from which the intention of the voter in the last two cases can be inferred, save the ballots themselves and the mere fact that contestant was one of the candidates.

The majority report declines to reverse the action of the judges and count the votes.

988. The election case of Wallace v. McKinley, continued.

The House counted a ballot rejected by election judges because of distinguishing marks, on testimony that the marks were made by inadvertence.

Evidence of declarations of voters after the election as to how they voted was rejected as hearsay.

Discussion as to whether or not the voters are parties to an election case in the sense that their declarations are admissible to prove their votes.

Discussion of an election case as a public inquiry, admitting a liberal rule of evidence.

Does the fact that an election case is instituted by a memorial instead of on pleading under the law justify a different rule of evidence?

Discussion as to the applicability of English decisions to American election cases.

(2) A question arose as to a marked ballot. The majority say:

In Lee Township, Carroll County, a ballot for contestant was not counted by the judges, because it had a name and some figures on the back of it. It is claimed by the sitting Member that this ballot is obnoxious to the statute of Ohio which forbids any mark or device by which one ticket may be distinguished from another. The evidence shows that this ticket was voted in the condition described by accident or inadvertence. We do not think that it is within the mischief intended to be prevented by the statute, and count it for this contestant.

The minority held:

The majority report allows a ballot which was rejected by the judges of election in Lee Township, Carroll County (Rec., p. 177). It was not counted, because on the back of it was written in ink, "H.—W. J. McCauseland," and then two columns of figures under the letters R. and D., respectively. The ballot was clearly in violation of the statute supplement to Revised Statutes, section 31. It provides:

"That all ballots voted at any election held in pursuance of law shall be written on plain white paper, or printed with black ink on plain white news-printing paper, without any device or mark of any description to distinguish one ticket from another, or by which one ticket may be known from another by its appearance, except the words at the head of the ticket, and that it shall be unlawful for any person to print for distribution at the polls, or distribute to any elector, or vote any ballot printed or written contrary to the provisions of this act: *Provided,* That nothing herein contained shall be construed to prohibit the erasure, correction, or insertion of any name, by pencil mark or otherwise, upon the face of the printed ballot."

The ballot had clearly on the back of it what made it a mark which served to distinguish it from other ballots. (McCrary, sec. 403; Hirk *v.* Rhoades, 46 Cal., 398.) 'We do not think the ballot should be allowed contestant.

The chairman, in his report, seems here to forget his purpose to allow all reasonable presumptions in favor of the action of the judges of elections, as availed of in the instances of J. Wales and J. H. Walser.

(3) An important question, lying at the foundation of much of the testimony by which sitting Member tried to prove illegal votes cast for contestant, related to testimony of persons to whom voters had made declarations. The majority say:

The sitting Member insists that declarations of voters made long after the election, not under oath, are admissible to prove how they voted. Even if this evidence were competent, we could not under the rule just cited add more than 10 to the votes involved in doubt; in any view, therefore, the contestant's plurality can not be overcome. But we believe that these unsworn declarations of voters made after the election are hearsay and inadmissible for any purpose. It has been attempted to justify the admission of this species of evidence upon the pretext that the voters are parties to the case. They are not served with notice; they have no right to appear in the contest in their own right, either in person or by counsel; they can not of their own motion even present themselves as witnesses. They are as much strangers to the case as the men of the district who did not vote or the women and children of the district or the other people of the United States.

It is also urged that this is a public inquiry, and therefore a more liberal rule of evidence ought to prevail. But we fail to discover in this suggestion any good reason why a controversy involving the right to represent 150,000 people and to make laws for the entire Union should be adjudicated upon evidence which the courts have always rejected in other causes.

In the early cases of contested elections they originated in the House, and the witnesses were examined in the presence of the Committee on Elections or of a subcommittee detailed for that purpose. Under this practice there was possibly more significance in this suggestion of "a public inquiry," many of the cases arising upon memorials of private citizens. It was during the prevalence of this practice that the celebrated New Jersey case arose. Cases in the English House of Commons were originated and conducted in a similar manner. But since Congress passed the act governing contested elections they are instituted upon regular pleadings like any other suit, the proofs taken by the parties before designated officers, and all the proceedings are conformed to judicial precedents. We respectfully submit that it is greatly to be desired that these cases should be adjudicated upon the principles as well as the forms which prevail in the courts.

The vicious tendency of hearsay evidence in election cases needs no demonstration. An unlawful vote may be cast for one party, and then upon the unsworn statement of the voter it may be deducted from the other party.

And we deny that the weight of authority is in favor of the admission of this class of testimony. On the contrary, we affirm that the overwhelming weight of authority supports the view which we have taken.

In the debate this point was much controverted, and Mr. Turner [1] insisted that the House should not follow the English precedents, which were originally established when voting was viva voce and when the voter's declaration, being as to qualification, and therefore being against his own competency, was received. But the American cases were the other way, and he referred to Letcher *v.* Moore, and especially to Farlee *v.* Runk, where such testimony as "He told me he voted for Mr. Runk" was not approved. The case of Cessna *v.* Myers was also cited as a main authority. Bell *v.* Snyder and Newland *v.* Graham were also referred to, while it was denied that the case of Vallandigham *v.* Campbell was as cited by the minority.[2]

The minority views contend:

The case of Cessna *v.* Myers (Contest. Elect., 1871–1876, p. 60) has been supposed to be authority opposed to the admission of this class of testimony. While the report discusses the question, and it is stated that some of the committee think that such declarations are only admissible when part of the res gestse, and all agree that such evidence should be received with caution, only to be acted on when declarations are clearly proved and in themselves satisfactory (p. 65), the committee and the House did consider the testimony and act upon it in deciding the case. So, notwithstanding the discussion of the subject and the expression of the opinion of the member of the committee who framed the report, the case is an authority in favor of the admissibility of such testimony, holding "evidence of hearsay declarations of the voter can only be acted upon when the fact that he voted has been shown by evidence aliunde, and the declarations clearly proved and are themselves clear and satisfactory" (p. 67).

Cook *v.* Cutts, Forty-seventh Congress, ought to be mentioned perhaps. What is said on the subject in the report of that case, as the writer of this report knows, was not the result of a decision by the committee. The question was not essential to the determination of the case, but that turned upon other grounds.

This subject was most elaborately discussed in the case of Vallandigham *v.* Campbell, and the conclusion reached sanctioned by the House, was that such declarations are admissible.

The report has distinguished names attached to it, such as Mr. Lams, (now Senator), from Mississippi, and Ex-Governor J. W. Stevenson, of Kentucky.

This case is cited and approved in People *v.* Pease (27 N. Y., 51).

The doctrine contended for is upheld in State *v.* Oliver (23 Wis., 319, 327).

The person assailing the right of the voter and charging against him moral turpitude and crime in the unlawful exercise of the franchise should not be compelled to make this alleged dishonest adversary his own witness, thus giving validity to his testimony. The doctrine is well settled that it is not necessary in such cases to first call the voter:

"It was not done in any of the cases decided in the British Parliament. It is not necessary in settlement cases, where the declarations of the parishioner may be given in evidence, and the Supreme Court of the United States has expressly decided that where a witness can not be compelled to answer he need not be called. (1 Greenleaf on Ev., 175; 6 Peters, 352–367. Vallandigham. *v.* Campbell, supra.)"

Wigginton *v.* Pacheco (Cases 1876, p. 10).

The common-law rule as to hearsay evidence can not be made to apply. If so, it would apply and exclude the evidence just as much after the voter had been called and refused to testify as before.

The suggestion of the chairman of the committee that the rule of admitting the declaration of voters as to how they voted originated in the House in the early cases of contest, when witnesses were summoned and testified personally before the Committee on Elections, in no sense destroys the force or reason for the rule. If competent in one case it must be dearly competent in the other. He fails to state, what is the fact, that the rule has been followed since Congress passed the act governing contested elections. Notably in the case of Vallandigham *v.* Campbell in 1858, and in the very recent case of Wigginton *v.* Pacheco in 1877, and in other cases. The fact that election cases are tried upon pleadings now instead of upon a memorial can not be justly held to change the rule in question. This does not make the contest any more a proceeding, inter partes than it was before. The public has the same interest and rights in the contest as they ever had.

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[1] Record, p. 4592.

[2] See also Record, pp. 4578, 4579, 4582, and 4583, for speeches of Messrs. Cook and Hurd reviewing precedents, especially the English.

989. The election case of Wallace v. McKinley, continued.

To reject votes cast by persons alleged not to have lived within the precinct, the best evidence regarding precinct lines should be produced.

Discussion as to the qualifications of paupers residing in an alms house.

Where returned Member's name was written on an opposition ballot under contestant's, with the latter not scratched, the vote was counted for returned Member.

The fact that a voter was registered in a county infirmary as an idiot, did not avail to cause rejection of his vote as illegal under the law.

The vote of a person under guardianship for lunacy was sustained on testimony that he was employed in a position of some responsibility.

(4) As to votes alleged to have been cast by persons not living within the precinct, the majority say:

In this list there are 5 votes alleged to have been cast for contestant in wards of the city of Canton in which the voters did not reside, and 2 votes said to have been cast for contestant in townships in which it is claimed the voters did not reside. In these cases a dispute arose as to the boundaries of these voting subdivisions, and if the highest evidence should be required on this question, the municipal ordinances or official action of the local authority having jurisdiction and establishing these boundaries should have been produced. In the city of Canton it is alleged, and not denied, that a very recent change of ward limits had been made.

The minority say:

John Rigler, Frank Walters, M. Zilch, Daniel Winkleman, Celestin Jourdain, are proved to have voted in the wrong wards in Canton. They each admnt this, and say upon oath that they voted for Mr. Wallace.

It is expressly provided by the constitution of the State of Ohio, article 5, section 1, that to be an elector requires residence in the State for one year, and of the "county, township, or ward, in which he resides such time as may be provided by law."

Section 2945 Revised Statutes of Ohio, 1880, provides that—

"No person shall be permitted to vote at any election unless he shall have been a resident of the State for one year, resident of the county for thirty days, and resident of the township, village, or ward of a city or village for twenty days next preceding the election at which he offers to vote, except where he is the head of a family and has resided in the State and in the county in which such township, village, or ward of a city or village is situate the length of time required to entitle a person to vote under the provisions of this title, and shall bona fide remove with his family from one ward to any other ward in such city or village, or from a ward of such city or village to a township or village in the same county, or from a township or village to a ward of a city or village in the same county, or from one township to another in the same county, in which cases such person shall have the right to vote in such township, village, or ward of a city or village without having resided therein the length of time above described to entitle a person to vote."

Moreover, it is made a crime by the laws of Ohio to vote in a ward or election precinct in which the voter has not actually resided for more than twenty days preceding the election. (Rev. Stats. of Ohio, 1880, § 7047.)

This precise question was passed upon in the case of Vallandigham v. Campbell (Contested Election Cases, 1834–865, p. 232):

"Of nonresidents of the ward or township, two votes are disputed by the returned Member and none by the contestant. It is not denied that both of these voters were legal electors of the county; but having voted (though not fraudulently, but by mistake) out of their proper wards, the undersigned find the votes illegal and deduct them from the poll of the contestant. (Report Vallandigham *v.* Campbell, supra. See also Cushing's Law and Pr. Leg. Assemb., 9th ed., § 24. Cook *v.* Cutts, 47th Congress. Wigginton *v.* Pacheco, Contested Elections, 1876.)"

The same is true of John Moriarty, who voted in the wrong precinct in Alliance, Stark County. (Rec., p. 400; J. W. Coulter, p. 401.)

Jos. Bittaker.— He voted in Sugar Creek Township for Mr. Wallace. The testimony shows that he resided with his father in Franklin Township, Tuscarawas County. He recognized the fact that he had no right to vote in Sugar Creek Township, and said he would offer to vote, and, if challenged, would go away.

The evidence is that he was a Democrat in politics. It is not denied by contestant in his brief that he was a Democrat, and no question is made apparently about his having voted the Democratic ticket.

In the debate[1] it was not denied that the votes should be deducted if they were shown to have been cast by persons proved legally to have lived out of the precinct; but it was objected that the testimony was not conclusive, since no competent evidence was produced that the ward lines were changed, and the testimony of a voter that he finds by a map (not adequately proven as official) that he lived out of the precinct was not admissible.

(5) The minority laid stress on certain votes of paupers:

It appeared in evidence that Charles Ducatry, M. Stimler, B. Waldecker, and Joseph Frickert were inmates of the Stark County Infirmary, situate in Plain Township. Ducatry voted at Louisville, Nimishillen Township; Stimler voted in Washington Township; Waldecker and Frickert in Canton Township, and all voted for Mr. Wallace.

An inmate of a county infirmary, who has adopted the township in which the infirmary is situated as his place of residence, is a resident and voter in the township in which the infirmary is situated. (Sturgeon *v.* Korte, 34 Ohio St., 525.)

Each of these persons states, unequivocally, that he regarded the poorhouse as his home, had no other home, and never expected to leave the infirmary. They said they voted in the townships to which they were taken to vote because they were told to do so. Frickert said he voted in Canton because he got his papers there. None of them, owing to poverty, great age, and infirmity, had any expectation of living elsewhere. They had a right to vote in Plain Township, and nowhere else.

The majority report does not consider this question specifically; but in the debate[2] it was shown that these four voted at this election in their old homes as they had done before, and it was claimed that the decision of the supreme court of Ohio did not go to the extent of compelling them to vote in the precinct where the institution was located. They had a right to elect, on the theory put forth on behalf of the majority.

(6) The majority concluded that votes should be counted under these circumstances:

Again, a recount was also had in Austintown Township, Mahoning County, at the instance of the sitting Member, and 2 ballots were found in the box which had not been counted by the judges of election. On one of these ballots the name of the contestant was written under the printed name of the sitting Member, and on the other the name of the sitting Member was written under the printed name of the contestant, and the printed name on each had not been erased. These ballots should, we think, have been counted according to the written names appearing on them.

The minority say:

The ballot shown to have been voted in Selem Township, Washingtonville precinct, and not counted, was a regular Democratic ticket, with Mr. McKinley's name written in full under the name of Mr. Wallace as a candidate for Congress, the name of Mr. Wallace not, however, being scratched. The writing should prevail, and the ticket not having been counted should be added to Mr. McKinley's Poll.

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[1] Speech of Mr. Adams, of New York, Record, p. 4537.

[2] Speech of Mr. Adams, Record, pp. 4536, 4537.

(7) As to certain alleged incompetent voters the minority views say:

Samuel Thompson was a Democrat, and always voted that ticket; he voted at the election in this township, and unquestionably voted for Mr. Wallace. He is an inmate of the county infirmary, and registered there as an idiot, and if the proof shows that he is an idiot, under the constitution of the State he is not a legal elector. (Constitution of Ohio, art. 5, sec. 6.)

(Thos. H. White, Rec., p. 163; Craig D. Filson, Rec., p. 165; Wm. Davidson, Rec., p. 168; Horace P. Hessin, Rec., p. 170; A. J. Cowan, Rec., p. 443; Jas. Brubeck, Rec., p. 446.)

Michael Higgins voted at the election in Leetonia precinct. He was an insane person, under guardianship as such, and, his own declarations show, was not of sufficient intelligence to know how he voted; although there is some conflict in the testimony, we do not think there is sufficient evidence to overcome the presumption arising from the inquisition of lunacy and the appointment of the guardian, which is shown.

The only proof of the person for whom he voted is the testimony showing that he came to vote with his fellow railroad-track hands, who were Democrats, was living with his brother, who was a Democrat, and was understood to be a Democrat; but we think the evidence is sufficient on the authority of the case of Vallandigham, *v.* Campbell, supra, and the authorities there cited. (See pp. 233, 234.)

In the debate [1] it was claimed on behalf of the majority that these two votes were competent, Higgins being employed as a railroad hand to act as watchman at a crossing. His employers testified that he was competent for that responsible service.

(8) The minority set forth in their views this rule, which they conceived should prevail:

The House will please observe that the evidence adduced by contestee, and the substance of which has been given or referred to in his report in support of his claim as to the said list of 55 alleged illegal voters for contestant, stands substantially without contradiction or conflict. Evidence in rebuttal was introduced by contestant only in a very few instances, and none at all as to the votes in Liverpool Township. In the few cases where evidence in rebuttal was taken it served only to confirm the evidence in chief. If the evidence was not true contestant had the means and an ample opportunity to refute it and show how the facts were. When the legality of votes is assailed, upon notice and answer, and the issue is formed, that issue is to be fairly heard and tried upon evidence. When one party adduces apparently credible evidence, sufficient of itself to maintain the issue, the opposite party is called upon to meet it; and if he does not do it, with the means at hand, there can be but one reasonable conclusion, and that is that there was no answer to it. The committee adopted such a rule in the case of Manzanares *v.* Luna, decided at the present session.

The majority report does not discuss this subject.

(9) The remaining questions involved in the report were largely as to facts and the credibility of testimony.

The majority of the committee, in accordance with their reasoning, concluded that contestant was elected, and proposed these resolutions:

Resolved, That William McKinley, jr., was not elected a Member of the Forty-eighth Congress and is not entitled to a seat in this House.

Resolved, That Jonathan H. Wallace was elected a Member of the Forty-eighth Congress and is entitled to a seat in this House.

The minority contended that sitting Member was elected by 67 majority.

The report was debated at length on May 26 and 27,[2] and on the latter day a

[1] Speech of Mr. Turner, Record, p. 4591.

[2] Record, pp. 4523, 4568–4594; Journal, pp. 1325–1327. Appendix, pp. 257, 415.

motion to substitute a proposition of the minority declaring sitting Member entitled to the seat was disagreed to, yeas 108, nays 158.

The resolutions of the majority were then agreed to without division.

Mr. Wallace thereupon appeared and took the oath.

990. The Indiana election case of English v. Peelle, in the Forty-eighth Congress.

The House reluctantly sustained a report holding that the use, with fraudulent intent, of very thick paper for ballots, constituted a distinguishing mark.

The House reluctantly sustained an unauthorized recount made incidentally during a legal recount for a State office.

The House rejected votes cast by prisoners brought from the jail to the polls and voting under duress.

The House rejected the votes of paupers who were carried to the polls by officers and compelled to vote contrary to their party affiliations.

On May 14, 1884,[1] Mr. George L. Converse, of Ohio, from the Committee on Elections, submitted the report of the majority of the committee in the Indiana contested case of English *v.* Peelle. Sitting Member had been returned elected by an official majority of 87 over the contestant.

The entire controversy was confined to the single county of Marion, and principally to the city of Indianapolis.

The majority report at the outset charged that all but two election precincts in the city were under control of sitting Member's party, and that the other party had but one out of 56 election inspectors. But in the minority views and the debate[2] it was pointed out that at each and every precinct contestant's party was represented by a judge, a clerk, and a watcher. The law of Indiana required this representation, and the law was complied with.

The majority report charged, and it does not appear to have been denied, that the police force was controlled by sitting Member's party.

The examination of this case involved the discussion of several points.

(1) The alleged destruction of the secrecy of the ballot.

The report says:

> The work of the police and other Republican officials in intimidating and unduly influencing voters was no doubt facilitated by tickets that were used by the Republicans in Marion County at this election, commonly called "springback tickets," because printed on a material that would spring open when lightly folded, thus facilitating double voting. These tickets were printed on a material called "plate," such as is generally used by lithographers. It was bought and billed to the party who printed the tickets as "plate." This material is not plain paper such as is ordinarily used for printing, and especially for printing election ballots. The witnesses say they never knew such material to be used for election tickets before. It is a thick, heavy material, of such finish, bulk, and texture as to be easily distinguishable from tickets printed on ordinary paper, and for that reason contestant claims that it is in violation of the Indiana statute, which reads as follows:
>
> "All ballots which may be cast at any election hereafter holden in this State shall be written or printed on plain white paper of a uniform width of 3 inches, without any distinguishing marks or other embellishments thereon except the names of the candidates and the offices for which they were voted." (Sec. 4701, Revised Statutes of 1881.)

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[1] First session Forty-eighth Congress, House Report 1547; Mobley, p. 167.

[2] Record, p. 1343.

And also that it is in violation of the spirit of the constitution of Indiana, which provides that all elections by the people shall be by ballot. (Art. 2, sec. 13.)

In William *v.* Stein, 38 Indiana, page 89, the supreme court construed the provisions of the constitution above referred to. It was there decided that the word "ballot," as used in the constitution, "beyond doubt * * * implies absolute and inviolable secrecy, and that the principle is founded in the highest consideration of public policy." (P. 95.)

The court quotes from Cooley's Con. Lim., 604, as follows:

"These statutes are simply declaratory of the constitutional principle that inheres in the system of voting by ballot, and which ought to be inviolable, whether declared or not. In the absence of such a statute, all devices by which party managers are enabled to distinguish ballots in the hands of the voter, and thus determine whether he is voting for or against them, are opposed to the spirit of the constitution, inasmuch as they tend to defeat the design for which voting by ballot is established."

The evidence is conclusive that these tickets could be, and were, distinguished in the hands of the voters from 15 to 30 feet distant, and the secrecy of the ballot guaranteed by the constitution and laws of a sovereign State was thus destroyed in Marion County. One of the Republican managers, who was instrumental in getting up the tickets, stated that they were gotten up as "a scheme to beat the Democrats." Another prominent Republican admitted on the day of election that the tickets were fraudulent and gotten up for fraudulent purposes. (Rec., pp. 103–121.) The fraudulent intent is apparent. There were 12,551 of these fraudulent tickets voted at that election in Marion County, and it is shown that the Democrats formally protested against receiving and counting these tickets. (Rec., pp. 67, 124, 126, 121.)

Your committee hold that the object of the ballot system is secrecy; that when the constitution of Indiana said her citizens should vote by ballot it meant a secret ballot; that when the legislature said that the ballots should have no embellishments or other distinguishing marks it meant that the ticket should be such that it could not be known for whom the voter was casting his ballot; that any ticket printed on material, plain white in color though it be, yet so thick as to be readily distinguished from ordinary paper in use for such purposes, is as much a distinguishing mark and as much in violation of law as if it had the photograph of the candidate printed on it. The evidence discloses in this case a deep-laid and cunningly devised scheme to avoid the statute and to compel the poor and humble voter to "show his hand" to his party and his employer. The fact appears that some voters came to the polls to vote, and on discovering the character of the ticket refused to vote and went away. Others undoubtedly were constrained to vote by these mean and the circumstances surrounding them against their will. The fraud on the part of the friends of contestee is glaring and so well established that if there were no other facts in the case than those connected with the "spring-back tickets" your committee would find no difficulty in setting aside the election and but little in recommending the seating of the contestant.

The minority views, presented by Mr. Alphonso Hart, of Ohio, dissented from the above view.

There is nothing in the statute of Indiana declaring either a penalty for the violation of this law or declaring that ballots on any other kind of paper are invalid.

There is no doubt, indeed it is admitted, that the ticket used by the Republicans at that election and upon which the name of Mr. Peelle appeared conforms strictly to the letter of the foregoing statute. It was a ticket printed upon plain white paper; it was of the length and width required by the statute; it had no mark or device upon it such as is prohibited by the statute, and the only claim that is made against the ticket at all is that, although it was of plain white paper and of the proper length and width, it was of greater thickness than that which is ordinarily used, and that by reason of this thickness the ticket could be detected in the hands of the voter and distinguished from the other tickets that were cast. It seems to us that it as clearly complies with the requirements of the statute as the two other tickets that were in the field. They were all of plain white paper and of the proper length and width. The Republican ticket is printed on No. 2 book paper, the Democratic ticket is printed on No. 3 book paper or a high grade of newspaper, and the National ticket on common newspaper. But no two of the tickets, either the National or the Democratic or the Republican, were exactly alike in thickness, and in weight of paper. Which of these should be the standard? If they had all three been of the same kind, whether of the thickest or the thinnest, they would have complied with the statute and no objec-

tion could possibly have been made; it is only upon the ground that one is thicker than the other, or that one is thinner than the other, that exception is taken. If it be contended that the Republican ticket could be identified because it was thicker than the Democratic ticket, it can with equal force be charged that the latter can be detected because it was thinner than the Republican.

From the testimony which appears in the record there certainly can be nothing said against the validity or the legality of the ticket in question. It as clearly complied with the provisions of the statute as the others, and it would be an extraordinary position to take after a ticket had been cast by as many thousand voters as is found to be the case in this instance with the character of the ticket well known, to say that all of these voters should be disfranchised in consequence of the single fact that the ticket, although complying strictly with the provisions of the law, was a little thicker than in the judgment of the friends of Mr. English it ought to have been.

It is claimed by the majority report that the purpose of the Republicans in using this kind of paper was to enable persons to identify the ticket in the hands of the holder. This is wholly unwarranted. The proof shows that the only object was to prevent the ticket from being counterfeited, and also to prevent the tickets, when in bunches, from sticking together, and all intention to violate or evade the law is expressly denied.

The law was not violated. It not only complies with the statute, but is fully sustained by the judicial authority of Indiana, not only in this particular instance, but in other cases where the principle is involved.

It appears from the record that after the November election a contest arose in the courts of Indian as to the matter of sheriff in Marion County. J. W. Hess was the Republican candidate and D. A. Lemon the Democratic candidate. Hess was shown by the returns to be elected by 12 votes. Lemon contested the election. A recount of votes was had, resulting in increasing the majority of Hess over 40. The tickets upon which Mr. Hess was elected were the same as that upon which the name of Mr. Peelle appeared.

One of the points made was the legality of the ticket.

If the ticket was illegal as to Peelle—that is, if it was on the wrong kind of paper—then it was equally so as to Hess, and yet in the election contest for the sheriffalty the court sustained the validity of the ballot upon which the name of Hess appeared, and thereby gave its sanction to the one upon which the name of Peelle appeared, they being the same. It follows from this that in the judgment of the court of competent jurisdiction no objection can be made or was made to the character of the ballot that was used.

This is, to a certain extent, an adjudication of the matter. But, beyond this, a still more important consideration arises. What was the character of the law of Indiana designating the kind of ballot which was to be used, and the paper upon which the ticket was to be printed? Was it directory or mandatory; was it a penal statute or otherwise? If it was merely directory, or even if it was intended to be a penal statute, then the penalty as well as the wrong must attach only to those parties who printed the tickets. It can not attach to the voter, and it would be a matter of very great injustice to deprive the citizens of the State of Indiana who voted this ticket of the right to be heard through the ballot box, simply because the paper upon which the ticket voted by them was printed is alleged not to be strictly of such a character as is required by statute. The whole theory of a Government which is to be managed and controlled by the people exercising the elective franchise is that their will, when fairly and honestly expressed, shall be the law and shall be respected by all the authorities. There can be no doubt but that the voters of the seventh district, in the use of the ticket to which attention has been called, honestly intended to express their judgment as to who should be chosen for the respective offices named. We think, therefore, for this reason, as well as for the other reasons already given, that this vote should stand as the expression of the will of the people of the seventh district and of the State of Indiana.

In the debate the question of the illegality of the tickets was treated as of importance, and it was argued that they were illegal, although no attempt was apparently made to ascertain their number, and no specific reduction or rejection of the poll was proposed.

(2) The value of an unofficial count in determining the true state of the vote, the official return being alleged to be impeached.

The majority report declares that the credit due to the returns of the several precinct officers is greatly impaired by the fact "that 54 of the 56 voting places in the city were controlled by partisan officers who were more or less parties to the general fraudulent intent which pervaded the Republican managers." "And it is further impaired," says the report, "by the fact that it has been officially determined by a Republican board, who, under the law of the State and by the appointment and approval of a Republican judge, made a recount of the votes for sheriff at the same election, that the official returns were false and unreliable as to sheriff." The report then continues:

When once the taint of fraud or unreliability is attached to the official count its value is gone, and we must look to other sources for better information. The law of Indiana in regard to the preservation of the ballots is as follows:

"As soon as the votes are counted, and before the certificate of the judges, prescribed in the foregoing section, is made out, the ballots, with one of the lists of voters and one of the tally papers, shall in the presence of the judges and clerks be carefully and securely placed by the inspector, in the presence of the judges, in a strong and stout paper envelope or bag, which shall then be tightly closed and well sealed with wax by the inspector, and shall be delivered by such inspector to the county clerk at the very earliest possible period before or on the Thursday next succeeding such election, and the inspector shall securely keep said envelope containing the ballots and papers therein, and permit no one to open said envelope, or touch or tamper with the said ballots or papers therein; and upon the delivery of such envelope to the clerk, said inspector shall take and subscribe an oath, before said clerk, that he has securely kept said envelope and the ballots and papers therein; and that after said envelope had been closed and sealed by him in the presence of the judges and clerks, he had not suffered or permitted any person to break the seal, or open said envelope, or touch or tamper with said ballots or papers, and that no person has broken such seal or opened said envelope, to his knowledge, which oath shall be filed in said clerk's office with the other election papers. The clerk shall securely keep said envelope so sealed, with the ballots and papers therein, in the same condition as it was received by him from the inspector." (Rev. Stat., 1881, secs. 4713, 4714.)

It will be seen the law required the ballots to be carefully sealed up and delivered to the clerk. In this case the clerk, D. M. Ramsdall, is the same person who was chairman of the Republican county committee, and who selected the "plate "for and aided in getting up the illegal "spring-back "ticket. (See his deposition, Rec., pp. 365–367.) On the same day of the election for Congress a sheriff was to be elected for the county. There was a contest, and the circuit court, presided over by a Republican judge, under the laws of Indiana appointed a commission to recount the ballots cast for sheriff. This commission consisted of two Republicans and one Democrat. These commissioners executed the order of the court and reported thereto unanimously that the ballots showed that the returns made by the election officers and board of canvassers were not correct; on the contrary were full of errors, amounting in the aggregate to 49 votes. (See Rec., pp. 86, 403, 410.)

Hon. Austin H. Brown, one of these commissioners, an experienced and able expert, and a gentleman of the very highest character and standing, testified that at the same time he carefully examined and counted every vote for English and Peelle for Congress; that the returns were full of errors as to the vote for Congress, as well as sheriff; that the errors amounted in the aggregate to 99 votes in favor of English, and that English was certainly elected.

After calling attention to Mr. Brown's testimony, the report continues:

This testimony of Mr. Brown, one of the commissioners appointed by the court to count the ballots for sheriff, also shows he counted the ballots at the same time for Congress. He conclusively proves that the errors amounted in the aggregate to 99 votes in favor of contestant.

The value of the recount made by him must turn upon the capacity of Mr. Brown to make the count and his veracity in testifying in regard to it. If these are both established, as much weight should be given his count as if he had been directed by the court to make it. That they are fully established let the following testimony, both as to his integrity and capacity, bear witness.

The report also cites testimony to show the reliability of the witness and his capacity as a man of affairs, able and skilled to make a recount.

The minority views assail this recount, saying of the commissioners:

They were not instructed to make the count as to any other candidate. They were sworn to make the count upon the matter of sheriff honestly and truly, and this was the extent of their authority and duty. A short time, perhaps a clay or two, before the count began by these three commissioners, William H. English, the father of the contestant, approached Mr. Brown and employed him to make also a count as to the votes received by the respective candidates for Congress. This was a private arrangement, the service to be rendered by Brown for a consideration to be paid by English. No other member of the commission was spoken to upon the subject. Nine wards were counted during the first and second days. Brown claims that while counting the vote upon sheriff he also counted the vote upon Congress for those nine wards. It is an admitted fact that he did not communicate to anyone what he was doing. On the second day Mr. Byram, one of the other commissioners, became aware of the fact that Brown was making the count upon Congress, and from that time afterwards, during the remainder of the count of Marion County, they together kept count as to the Member of Congress. At the end of the count, according to the testimony of Mr. Byram, Peelle had gained so that his majority in Marion County would have been 767 instead of 640, a gain of 127. But Mr. Byram. did not claim that this count was absolutely correct, but that it was as nearly correct as could be made under the circumstances, he doing the best he could.

The minority call attention to the fact that Mr. Brown testified that in his opinion the ballots had been tampered with, since the ticket which he himself voted in a certain precinct he had marked, but could not find it when the recount was made.

Say the minority:

If it is to be granted as a fact that the ballots in Marion County, after the election and before the count made for sheriff by these commissioners, had been tampered with, then according to all the authorities upon the subject, without an exception, the subsequent count made by Brown, or by anybody else, is wholly unreliable and never can be considered or treated as overcoming the original official count. The contestant, by making this claim, entirely admits away his case. Outside of the statement of Mr. Brown there is no evidence, so far as we know, that any improper action had been taken in regard to these ballots. They had been from the time of the November election up to the time of the count in the custody of the proper sworn officers. But he claims, and his counsel insist, that the ballots had been tampered with, and we answer, if this be so, then it furnishes a reason why the count made by Brown can not be relied upon to overcome the official returns.

But there are other reasons still stronger why no reliance whatever can be placed upon his action in this matter.

First. He was the hired agent and employee of William H. English, a party interested in disturbing the count and making a ground of contest. He would naturally, almost inevitably, be inclined to take such action and make such a report of his proceedings as would favor the purpose had in view by Mr. English, his employer.

Second. The count made by him in the beginning was secretly made, and made with the evident purpose of accomplishing something which it was not intended anybody else should have knowledge of.

Third. Mr. Brown, upon his examination on the witness stand, is unable to give any intelligent statement of the condition of the vote in a single precinct in Marion County. He claims that, as he made the count of the first nine wards, he took a memorandum of the vote that was cast for each of the candidates for Congress, and that at the end of his count, from the data thus gathered, he made an estimate, and that the estimate which he made decreased the majority of Peelle 99. It is a very singular circumstance that when he is placed upon the stand all of these memoranda which he swears were taken at the time, and which if taken would indicate the character of the vote in the respective precincts, are missing. He is not able to produce a single scrap of paper showing the condition of the count in the

precincts. He does, however, produce a paper in which he claims to have summed up the result of his investigation and which is put in the form of a declaration showing that there is a gain for Mr. English and a corresponding loss for Mr. Peelle of 99 in that county. He claims that the other memoranda which he took are lost.

Under the circumstances the disappearance of these papers, which every man of ordinary intelligence must have known would be very important, is a strange and a suspicious circumstance, affecting the integrity of Brown's deposition. In his examination he is unable to swear to anything save the final result as he claims he figured it out. He can not even tell the number of votes that were received by Peelle, or the number of votes that were received by English. He can not tell the number of votes given for either of these candidates in any ward or precinct. He can not give an intelligent statement of the condition of the vote either in the county as a whole or in any portion of the county.

Fourth. There is another circumstance which is of very great significance in the consideration of Brown's testimony. After his associate commissioners, who were helping him count the vote upon sheriff , had discovered what Brown was at there is no further increase of the vote of English, but, on the contrary, an increase of the vote of Peelle from that time forward.

Fifth. When the commissioners appointed, as we have stated, to count the vote upon sheriff in Marion County had concluded their work, the subject of the vote upon Member of Congress was talked over between them. In that conversation the remark was made by Byram and Adams that a recount of the vote upon Members of Congress would result in increasing the majority of Mr. Peelle, and the testimony is that all three of the commissioners, including Brown, concurred in this statement. The testimony further is that Mr. Brown at that time made the declaration that "there was nothing in a recount for Mr. English," and that he should so report to Mr. William H. English, his employer. These facts are testified to by Byram, Adam, and Hawkins.

In view of these facts, what possible weight can be given to the testimony of Mr. Brown? The count which he made was an unsworn and unauthorized count; it was a count made not under oath; it was made under circumstances wherein if he did the best he could it would be very difficult to be accurate, for the reason that his work as commissioner to count the vote upon sheriff would necessarily require his attention, and the matter of count upon Member of Congress would be only incidental.

Then again, as already appears, his inability to give an intelligent statement of the condition of the vote, and his admission that there was nothing in the count which would benefit Mr. English, will surely destroy his testimony. Now, the question comes, shall we permit the testimony of Brown, given under these circumstances and so thoroughly impeached by circumstances and by contradictory statements made by himself, to overcome the sworn official statement and returns of the inspectors and judges of election, made under oath and in the performance of their duty? To this inquiry there can be but one answer. It seems to us that no just-minded person will permit an election to be overturned upon so flimsy a pretense.

(3) The majority report also charges that about 34 or more prisoners from the county jail were taken to the polls and compelled to vote for contestee. But it appears from the minority view that "there were seven inmates of the jail who voted. They were shown to be legal voters in that precinct. Two others offered to vote, and their votes were challenged and rejected."

The majority report also asserts that 51 paupers from the county poorhouse were carried to the polls by the officers of the institution and compelled to vote for Peelle, and that two-thirds of them were proven to be Democrats. The minority say it was admitted that these persons were entitled to vote, and that there was no evidence that they were prevented from voting for the person of their choice. Not one of them was called as a witness.

(4) It was also claimed on behalf of contestant that 100 votes were lost to him because the police officers intimidated voters who approached the polls, and deterred them from voting.

The minority report says on this point:

In this connection it may not be improper to refer to the position taken in the report of the majority upon this point. It is claimed that about 100 persons were kept from the polls. There is not a particle of testimony in the whole record justifying any such conclusion. There are less than 350 voters in the precinct in question, and the returns show that 309 persons voted. The witnesses for contestant were able to give the name of but one man whom they claimed was rejected, while the inspector of election swears that not a single person who made the proper affidavit was denied his vote.

In the debate [1] much stress was laid on the fact that the names of these 100 men were not given; that none of them had been called to testify. Six witnesses who were called estimated that a hundred men who would have voted for contestant were kept from voting. Mr. Hart in debate asserted that it would be a most remarkable thing to count 100 votes for contestant by putting these 100 unknown names on the poll.

The majority thus recapitulated their conclusions:

To recapitulate:

(1) The correction of the error in counting the vote in Marion County gives contestant 99 additional votes.

(2) The fraud and coercion practiced upon the 51 paupers, 34 of whom were Democrats and compelled to vote for contestee, would, if corrected, add to contestant's vote 68 additional votes.

(3) The fraudulent jail vote counted for contestee makes in the result a difference of 34 additional votes.

(4) The 12 counterfeit tickets which were counted for contestee, and should have been counted for contestant, make in the result 24 additional votes.

(5) Votes of naturalized citizens, and others fraudulently rejected, 100 additional votes. Total, 325 votes.

(6) The destruction of the secrecy of the ballot by contestee's friends in the use of the springback tickets undoubtedly made a difference in his favor of several hundred more votes in the final result to which he is not entitled.

Your committee are therefore clearly of the opinion that the contestant, William E. English, was duly elected and is entitled to the seat in the House of Representatives in the Forty-eighth Congress from the Seventh Congressional district of Indiana, and recommend the adoption of the following resolutions:

Resolved, That Stanton J. Peelle was not elected a Member of the Forty-eighth Congress of the United States from the Seventh Congressional district of Indiana, and is not entitled to the seat he now holds.

Resolved, That William E. English was duly elected a Member of the Forty-eighth Congress of the United States from the Seventh Congressional district of Indiana, and is entitled to his seat.

The minority reported a resolution declaring Mr. Peelle entitled to retain the seat.

The report was debated on May 20 and 21,[2] the most important questions in the view of the House being the thick ballots and the authority of the recount.

On May 21 [3] the vote was taken on substituting the minority proposition for that of the majority, and there appeared yeas 121, nays 117. Then, by a vote of 119 to 118 the House adjourned, after a motion to reconsider had been made.

On May 22 a motion to lay on the table the motion to reconsider was disagreed to, yeas 132, nays 132. Then the motion to reconsider was agreed to yeas 133, nays 130.

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[1] Record, p. 4345.

[2] Record, pp. 4339, 4358–4377.

[3] Journal, pp. 1283, 1285–1288, 1299, 1300.

Thereupon Mr. Thomas M. Browne, of Indiana, moved to recommit the subject to the Committee on Elections "with instructions to make a recount of the ballots cast for the contestant and contestee * * * at the several precincts in the county of Marion."

This motion was disagreed to, yeas 124, nays 134.

Then the question recurring on the substitute proposed by the minority, it was disagreed to, yeas 128, nays 129.

The resolutions of the majority were then agreed to, yeas 130, nays 127.

Mr. English thereupon appeared and took the oath.

991. The Ohio election case of Campbell v. Morey, in the Forty-eighth Congress.

Full discussion of the status of college students as having or lacking the residence qualifications of voters.

Persons within a precinct as students, for a transitory or temporary purpose, without the interests or burdens of citizens, and going elsewhere for vacations, were held not to have voting residence.

Discussion as to what constitutes lunacy and idiocy justifying rejection of a vote.

Discussion as to the residence of paupers living in a public institution.

As to the principle of deducting unsegregated illegal votes by a system of computation.

Journeyman mechanics were recognized as having residence within the precinct where they lived for the statutory time.

A person may not vote in a precinct wherein he does not live, although required to preside therein as an election officer.

On June 16, 1884,[1] Mr. Robert Lowry, of Indiana, from the Committee on Elections, submitted the report of the majority of the committee in the Ohio contested election case of Campbell *v.* Morey.

The sitting Member had been returned by an official plurality of 41 votes.

Various questions were involved, but the essential point, dwelt on in the report and the debate, was as to the rights of certain students as electors.

The majority thus state the case of the students:

Ninety-six undergraduate college students voted in the precincts where the colleges are located. Twelve voted for contestant and 84 for contestee. With few exceptions they were not lawful voters. The statute of Ohio reads as follows:

"A person shall not be considered to have gained a residence in any county of this State, into which he comes for temporary purposes merely, without the intention of making such county his home."

This statute, and all other Ohio laws bearing on the subject of residence, are fully discussed in a case decided in the Ohio senate as recently as April 12, 1884, which seem to us to be a well-considered case upon the status of college students as electors in Ohio. It is the case of Mickey *v.* Loomis, to be found in the appendix to the journal of the Ohio senate for the session just ended. The following is the agreed statement of facts:

"It is agreed by the whole committee that, under the testimony, the decision of this contest shall depend upon the question as to whether certain students at Oberlin College, coming under the class described in the following agreed statement of facts, had or had not the right to vote at the October

[1] First session Forty-eighth Congress, House Report No. 1845; Mobley, p. 215.

election in 1883. The following is the agreed statement of facts above referred to, viz: The following is a substantial statement of the evidence concerning the right of students at Oberlin College to vote, and who, it is claimed, voted for Timothy G. Loomis:

"(1) Said voters were students at Oberlin College, in Russia Township, Lorain County, Ohio.

"(2) They voted there at the October election in 1883.

"(3) They claimed that Oberlin was their residence at that time.

"(4) They went to Oberlin for the purpose of acquiring an education, and at the time of voting were at Oberlin for that, purpose alone. They came there from other counties and States, and had been there long enough to acquire a residence.

"(5) They left the home of their parents, and never intended to return and make it their home.

"(6) They claim that they have no other place of residence than Oberlin.

"(7) They claim they have no place in view as a place of residence after their education is completed.

"(8) These student voters had never been married.

"(9) They were not assessed for tax purposes, and paid no tax in Oberlin.

"(10) It is admitted as true that Harrison J. Mickey, contestant, is entitled to his seat in the senate of the sixty-sixth general assembly, if, upon the facts hereinbefore stated, a student at college is not entitled to vote at the place where the college is located."

This statement is decidedly more favorable to the Oberlin students than the facts developed in the present case are to most of the students who voted in the seventh district of Ohio, yet under it the senate held that these students were disqualified, and rejected their votes.

The subjoined portion of the report is so clear that we quote it:

"In this connection let us look to section 2940 of the Revised Statutes of Ohio, which prescribes how judges of election shall proceed when a person offering to vote is challenged as unqualified, on the ground that he is not a resident of the county or precinct where he offers to vote. One of the questions required to be put to the person offering is this: 'When you came into this county did you come for a temporary purpose merely, or for the purpose of making it your home?' And here it may be remarked, in passing, that in this question, in the words 'or for the purpose of making it your home' is to be found the legislative definition of the word 'residence.' For the wording of questions 1 and 2 required to be put by the judges, when the person is challenged on the ground that he is not a resident, is as follows:

"'(1) Have you resided in this county for thirty days last past?'

"'(2) Have you resided in this precinct for twenty days last past?'

"But when they come to ascertain the purpose of the voter in coming into the county the question is, 'Was it for a temporary purpose' or 'for the purpose of making it your home?'

"There they use the word that has but one meaning; that word—the only one—which is understood by all men alike—a word which is as dear to the savage as to the civilized man—home.

"In quoting to the senate these rules for the guidance of judges of elections in Ohio—rules that are a part of the statutes of the State—we might well close our report with our recommendation alone, but we prefer to support it by authorities, which are conclusive against the 'student vote' as agreed upon in the statement."

We find much the same idea carried out in all the more recent decisions in other States. Dale *v.* Irwin (78 Ill., 170) is a very fine case; the language of the court is:

"These students were undergraduates of Shurtleff College, subject to its rules and regulations, and, so far as testimony shows, taking no part in town affairs, and paying no taxess, and not assessed on their personal property for taxation to aid in defraying expenses of the town. Some of them paid a road tax on labor, the street commissioners demanding this on a residence of ten days.

"As a general fact, however, undergraduates of colleges are no more identified with residents of the town in which they are pursuing their studies than the merest stranger, and should all the seats of learning in the United States be polled, not more than one student in twenty would be found to possess the proper qualifications of a resident of the town."

In Vanderpoel *v.* Jones (53 Iowa, 246), the court held that "one who becomes a resident of the county for the purpose of attending college, and who has formed no intention of remaining after the completion of his college course, is not entitled to vote in said county."

In Fry's election case (71 Pa. St., 302), known as the "Allentown case" (see Brightly's Leading Cases on Election, pp. 468–479), it is held that "students at a college living at the place in which it is located, whether supported by themselves and emancipated from their fathers' families, with no intention to return to their homes, or supported by their parents, who visit their home in vacation, and may or may not return after graduating, have not such residence as will entitle them to vote in the district where the college is."

Yet these students were assessed and paid taxes at the college town, and had lived from one to three years there, all claiming it to be their home. It is also held in the same case that "very few, if any, students, while residing at the college, acquire a new home or change of domicile, and they are, therefore, not entitled to vote. In the early history of our colleges, while the true meaning of the State constitution was fresh in the minds of the framers of that instrument, it was never pretended that the student acquired a residence at the college so as to become a qualified elector, to be liable to taxation, and to the performance of municipal duties. In those days, when the purity and freedom of elections prevailed, the parental home, or the locality from whence the student came, was universally accepted as the district in which he was entitled to vote."

It was also held that, in the opinion of the court, a "careful examination of the testimony leads to the conclusion that none of these students, whose votes are contested, were qualified electors at the last October election."

The court in this case draws the true distinction between students and laborers, and uses this language:

"Students being here for the sole purpose of being educated, and not coming animo manendi, but intending to go elsewhere as soon as graduation takes place, do not fall within the same category with unmarried men who seek employment from point to point, as opportunity offers. The student is in a preparatory condition, in a state of tutelage, and nonproductive, not yet able or willing to enter the world to engage in business or in the productive pursuits of life nor fully prepared to assume civil and political rights and duties. The unmarried man who has severed the parental relation becomes a laborer, producing for himself, and thus adds to the productive wealth of the community in which he resides, being willing not only to enjoy the political privileges, but also to assume and to discharge political and civil duties."

In Massachusetts there have been four cases, but none recently. The only one in any degree favorable to students is the very early case of Putnam *v.* Johnson (10 Mass., 488), where counsel for plaintiff especially based his claim upon the plea that his client was not an ordinary college student. His language (pp. 493 and 494) is:

"This case has been compared to that of students at college, but it more resembles the case of resident graduates or instructors, who have always voted in the town where the college is situated in which they reside."

All the later decisions, however, refuse to go so far, and are uniformly against the claim that undergraduate students are entitled to vote. Another case is Granby *v.* Amherst (7 Mass., 1, A. D. 1810), wherein Chief Justice Parsons says of a college student that he "was abroad merely for his education; during the vacations he was at home in Belchertown, and on receiving his degree he continued his residence in the same place. His absence was occasional and for a particular purpose, and we are satisfied that within the intent of the statute there was no change of his domicile. His home was at Belchertown; it was his place of residence, although from home for the purpose of instruction."

Another is the case in 5 Metcalfe, 587, where the court say:

"But in such case [i.e., residing at a university town] his right to vote at that place would depend upon all the circumstances connected with such residence. If he has a father living; if he still remains a member of his father's family; if he returns to pass his vacations; if he is maintained and supported by his father; these are strong circumstances repelling the presumption of a change of domicile. So, if he have no father living; if he have a dwelling-house of his own, or real estate of which he retains the occupation; if he have a mother or other connections with whom he has before been accustomed to reside, and to whose family he returns in vacation; if he describe himself of such place and otherwise manifest his intent to continue the domicile there, these are all circumstances tending to prove that his domicile is not changed."

The last Massachusetts case is in Cushing's Contested Election Cases (p. 346), in which the legislative committee uses this language:

"The requirements of the constitution and laws are not satisfied by merely abiding or remaining within the Commonwealth and town where the individual claims to vote. He must go there with the intent, bona fide, to make it his home—to obtain a domicile. If his home is in another State, or in another town in this State, and he is a sojourner for temporary purposes merely, intending when those purposes are accomplished, sooner or later, to leave the State or town and return home, he is not liable to the duties nor entitled to the privileges of a citizen of the town he sojourns in. This is a question of fact in each case, and the party who avers that he has abandoned his domicile of origin and taken up a new one is bound to prove it."

The latest and best known case in Congress, where this question has arisen, is Cessna *v.* Meyers (McCrary on Elections, p. 496), in the Forty-second Congress, which follows the Massachusetts decisions, and which is strengthened and extended in its scope by the foregoing Ohio, Illinois, and Iowa cases. There were also two very early Congressional cases which are clearly distinguishable from these later ones, in which it was held that certain students, under peculiar circumstances, were legal voters. One was the case of Letcher *v.* Moore (1 Bartlett, 750, A. D. 1833), in which especial stress is laid upon the fact that a student who had voted was a practical printer, working at his trade in the college town, and belonged to the local militia. The other case was Farlee *v.* Runk (1 Bartlett, 87, A. D. 1846), where the students paid taxes at the college town and in many other ways assumed the liabilities of citizens. We cite these cases to show the advance continuously made toward the rule that but few college students acquire a domicile and a right to vote in the college precinct. The estimate of lawful voters amongst them, as made by the court in Dale *v.* Irwin, above quoted—that of one in twenty—seems to us to be a very close approximation to accuracy. In the present case, however, we adopt no general rule, but predicate our conclusions upon the testimony. In weighing such testimony we have regarded as especially applicable in such cases the doctrine of Keith *v.* Stetler (25 Kans., 100), where it is held that "A man's acts and conduct are more to be considered in determining the question of a change of residence than any mere declaration of intent."

We have carefully examined the testimony in the case now before us, and, in our judgment, but 7 of the 96 students who voted were lawfully entitled to do so. They are S.I. Lindsay, J.G. Stewart, I.M. Burgan, S.J. Stahl, G.W. Branch, Tony Perry, J.A. Greene, J. Tillman, G.M. Tillman, D. Turner, F.D. Scott, E.A. Palmer, and G.W. Fairchild (who voted for contestee), and J.W. Scott (who voted for contestant). We have some doubts as to several of these, but give them the benefit of the doubt.

The following is a list of 71 students whom we find to have voted illegally for contestee: W. C. Houser, E. C. Hoover, W. A. Galloway, A. L. Glendenning, C. S. Spangler, J. U. Moore, K. C. Kunkle, Evan Griffiths, J. W. Smallwood, John Wardlow, E. G. Zimmer, G. F. Osler, W. R. Butcher, J. A. Beery, G. M. Brown, W. E. Bowman, P. E. Cromer, L. G. Cromer, J. B. Fairchild, J. L. Plummer, H. W. Gibson, Richard Foote, D. J. McMullen, E. S. Keeney, J. W. Freas, Simon Barr, S. N. Bousman, H. E. Miller, S. H. Darbyshire, H. C. Gibbs, W. S. Whitacre, U. H. Williams, M. J. Sanford, John Zell, W. F. Hague, L. Huston, J. H. Lansinger, W. T. Anderson, G. W. Prioleau, N. A. Banks, J. R. Scott, J. J. Bass, B. F. Morris, G. W. Nicholson, W. T. Young, W. H. Coston, C. N. Crosby, J. A. Kirke, Z. Roberts, S. C. Stewart, C. N. Williams, L. M. Beckett, P. M. Alexander, E. L. Bell, Aaron Brown, G. W. Hamilton, G. S. McElroy, C. A. Buck, W. I. Brooks, W. C. Lawther, W. J. Graham, W. J. Golden, J. S. Colvin, J. McNaugher, J. C. Gibney, H. T. Jackson, A. Gordon, L. W. Williamson, W. G. Martin, J. H. Bailey, and T. O. Baker.

Those students who voted illegally for contestant, 11 in number, are G. A. Crisman, A. E. McLaughlin, T. M. Smith, T. M. Lombard, J. A. Wiley, William Weber, G. E. Krout, A. M. White, S. E. Kirkpatrick, M. Benn, and J. R. Flowers.

Want of adequate time and space prevents comment on, or quoting in detail from, the depositions of the foregoing students. We call especial attention to what may be termed the general testimony bearing on each of the four colleges in the district. A careful perusal of that will greatly aid a just and intelligent judgment of the case. The general testimony bearing on the National Normal University will be found in the record, part 1, pages 493 to 495, 583, 584, 641, and 642. Reading this, in connection with the individual depositions of the students, it will be found that the university has an enormous annual attendance, and scarcely one student in a thousand settles or remains in the village where it is located; that these students, unlike the ordinary collegians, do not attend for a course of four years, but for merely for one or more sessions of eight or ten weeks each; that many are schoolteachers, living elsewhere, who come just long enough to attain proficiency in such branches of study as they may be teaching, and are soon off to their homes and employment; that, in a word, they are

there for a transitory and temporary purpose only. At this school many are young, the average age of those voting being only 23 years, although a few are quite matured. All have matriculated from distant places. None showed any act to indicate an intention to make Lebanon their home. They describe themselves from other places; went elsewhere in vacation, etc. None worked the roads nor paid taxes. None took such interest in public affairs as citizens ordinarily do. Out of the 35 who voted there illegally for contestee 10 had left the school during the short interval which elapsed between the election and the beginning of this contest. It is also shown that many of the Republican students at this university had been preparing themselves for examination as witnesses in this case by a systematic course of study, and had requested the faculty to especially instruct them upon their rights as witnesses in a contested election case, and that on the Saturday prior to the October election in 1882 they held a meeting in University Hall, at which outside parties addressed them and advised them to vote at the approaching election, regardless of the fact that they had not paid taxes, worked the roads, etc.

The general testimony relating to Wilberforce University would be found in the record, part 1, pages 280 to 283, 292 to 300, 357 to 359, 443, and 444. This institution is situated in the country, away from any village or city. It is attended only by colored people, the male students preparing to be ministers and teachers. They come mainly from distant States, only 6 out of the 20 illegal voters at that school having matriculated from the State of Ohio. There is but little difference between them and the normal students above referred to, except that their average age is higher, being 25 years, owing to the fact that their race, previous condition, and lack of early advantages had retarded their education. They never paid any taxes nor discharged any other civil obligations; they never worked the roads (with very trifling exceptions) until after the election in controversy; they have no means of getting employment in the country at Wilberforce, either in teaching, preaching, or other professional occupation; they are very transitory, coming and going as their exceedingly limited means admit. Five of those voting illegally had left the school before this contest began, two of them leaving the State. They were not called together by the faculty and other political leaders and instructed how to testify, but just one day before their examination Mr. A. G. Wilson, attorney for contestee, and chairman of the Republican county committee, published an article of his own writing in a Republican newspaper upon the topic "Rights of students—where should they vote?" He procured 500 copies of the paper, and every colored student in Greene County admitted receiving or seeing marked copies of the newspaper containing this article. Attention was also called to the article by a professor at public prayers in the presence of these witnesses.

The students at the Xenia Theological Seminary also read the foregoing marked copy of this newspaper, and, although studying theology, do not in any respect differ from the Wilberforce and Normal students, except that they generally remain a stated term of two or three years. They matriculated from distant places—see the following extract from the matriculation book, which is just as they signed it, and is, substantially, similar to the matriculation books of the other. colleges:

Names.	Post-offices addresses.	Presbytery.
W. I. Brooks	Northwood, Ohio	Sidney.
C. A. Buck	College Corner, Ohio	First Ohio.
W. J. Golden	Scroggsfield, Ohio	Steubenville.
J. C. Gibney	Odell Guernsey County, Ohio	Muskingum.
W. J. Graham	Scroggsfield, Ohio	Steubenville.
R. T. Jackson	New Concord, Ohio	Muskingum.
Albert Gordon	Hanover, Ind	Indiana.
W. C. Lawther	Wattsville, Ohio	Steubenville.
John McNaugher	Allegheny, Pa	Allegheny.
L. W. Williamson	Xenia, Ohio	Xenia.
Jesse S. Colvin	Chicago, Ill	Chicago.
W. G. Martin	Irondale, Jefferson County, Ohio	Steubenville.

They were all credited to distant presbyteries, where they retained their membership and church connection, and by which many of them were partially supported. They neither paid taxes nor worked the roads. Some of them took so little interest in local and municipal affairs that they could not tell which ward of Xenia they had voted in.

The majority say that in their opinion the student vote is decisive of the case:

To overcome contestee's majority contestant claims that 80 persons who were students unlawfully voted for contestee, and that 11 persons who were students unlawfully voted for contestant, making a net gain of 69 votes for contestant on the so-called student vote. The wholesale setting aside of this large number of votes, without reference to the merits of each individual case, is not justified by any known authority or precedent, and is inadmissible upon any view of the case. The desperate character of this case is demonstrated by this extravagant claim.

There have been four cases before Congress in which the legality of votes cast by persons who were at the time following the occupation of students were assailed, and in neither case were these votes held to be illegal. They are the cases of Letcher *v.* Moore, from Kentucky; Farlee *v.* Runk, from New Jersey; Koonts *v.* Coffroth, from Pennsylvania; Cessna *v.* Myers, from Pennsylvania.

McCrary, in his work on Contested Elections, reviewing the leading authorities, uses the following language, paragraph 41:

"It will be found from an examination of these authorities, and from a full consideration of the subject, that the question whether or not a student at college is a bona fide resident of the place where the college is located, must in each case depend upon the facts. He may be a resident and he may not be. Whether he is or not depends upon the answer which may be given to a variety of questions, such as the following: Is he of age? Is he fully emancipated from his parents' control? Does he regard the place where the college is situated as his home, or has he a home elsewhere, to which he expects to go and at which he expects to reside?"

Putnam *v.* Johnson (10 Mass., 488–502); Vanderpool *v.* O'Hanlon (53 Iowa, 246); Fry's Election Case (71 Pa. State, 302); Dale *v.* Irwin (78 Ill., 170); opinion of the judges (5 Metcalf, 587); Cushing's Election Cases (437), all support the view that each case must be determined on its facts.

The Ohio statute is as follows:

"Sec. 2946. All judges of election, in determining the residence of a person offering to vote, shall be governed by the following rules, so far as the same may be applicable:

"(1) That place shall be considered the residence of a person in which his habitation is fixed, and to which, whenever he is absent, he has the intention of returning.

"(2) A person shall not be considered to have lost his residence who leaves his home and goes into another State or county of this State, for temporary purposes merely, with the intention of returning.

"(3) A person shall not be considered to have gained a residence in any county of this State, into which he comes for temporary purposes merely, without the intention of making such county his home."

In the statute the words "residence" and "home" are used as convertible terms; both are defined in the statute itself as "that place in which his habitation is fixed." Habitation is "a place of abode;" fixed means "established."

"RULE 1. The residence or home, then, of a person is 'where his place of abode is established,' not forever, but for the time being, and to which, whenever he is absent, he has the intention of returning.'

"RULE 2. A residence is lost by leaving the home or "place of abode" and going into another State or county in this State, even for a temporary purpose, without the intention of returning.

"RULE 3. A person may gain a residence in any county in this State into which he comes for temporary purposes merely, if he does so with 'the intention of making such county his home,' his place of abode, not forever, but for the time being." (McCrary, par. 39; Sturgeon *v.* Korte, 34 Ohio St., 525–537; Miller *v.* Thompson, 118; and Pigotte Cases, 463, 2 Cong. Election Cases.)

The question of intention is of the highest importance, and is held by all authorities to be decisive whenever there is doubt as to which of two places is the residence of the voter.

In his testimony the contestant has set forth the portions of the student's register or matriculation book of each of the educational institutions, showing the names, address, etc., of each student as recorded on first entering college. With exception of a few names he repeats these lists in his brief, for the purpose of proving such students to be nonresidents. This whole question of matriculation books, as evidence in regard to residence of students, was very fully discussed and effectually settled in the contest of Letcher *v.* Moore, of Kentucky, in the Twenty-third Congress (1 Bartlett, 750). The contest involved, among other things, the right of students of Danville, then a part of Mercer County, to vote there. The Committee on Elections divided, the majority reporting adversely to the right and the minority favorably. The college register at Danville showed the names of students entered after this

manner: (1) David McKee, Harrison County, Kentucky. (2) Robert McKeown, Jefferson County, Kentucky.

The minority committee, in its report, says:

"Under the last resolution, the names of D. D. McKee (and other students mentioned), were stricken from the poll book by a majority of the committee. We think the committee erred in this decision. In order that our opinions may be the better understood, we will give the substance of the testimony laid before the committee in regard to each of the persons above named."

The students and the officers all say that the address does not indicate residence, but simply where the student came from.

After recounting the testimony, which in its general features does not differ materially from that in the present case, the committee goes on to say:

"The persons whose names we have mentioned as being stricken from the poll books were students at Centre College. Their votes were received by the officers of the election; this would be prima facie evidence of their being legal votes. He who denies their right must prove satisfactorily that they did not possess it. The register proves nothing but the place from which they originally came and the time of their entrance into college. It does not prove, nor purport to prove, even the time they came into the State or county. They performed all the duties of citizens, and could not be denied the rights of citizens. By the constitution of Kentucky there are three requisites to entitle a man to vote: He must be a free male citizen; he must have attained the age of 21, and he must have resided in the State two years and in the county one year next preceding the election. This age and residence give a position and vested constitutional right; of this right he can not be deprived without a palpable violation of the constitution. * * * His employment forms no part of his qualifications, nor is it material how long he intends to reside in the county after the election. The right is founded in prior residence, and his intended future residence neither gives nor tends to defeat it. Those persons were all 21 years of age. They had been in the State or county the length of time prescribed by the constitution, and actually resided in the county at the time of election. This is all the constitution requires, and it is not for us to require more. We think the majority of the committee erred in rejecting their votes."

The House sustained the minority report, and refused to seat the contestant.

The case of Farlee *v.* Runk, in the Twenty-ninth Congress (1 Bartlett, 87), is directly in point upon this question. The whole contest was based upon the denial of the right of students at Princeton, N.J., to vote in the college town. The constitutional qualification for voting in New Jersey was almost identical with the Ohio statute. The voter must be a male citizen of the United States, 21 years of age, a resident of the State for one year and of the county five months next preceding the election.

Mr. Farlee, in his memorial, represented that Mr. Runk's nominal and apparent majority of the votes of said district was obtained by his receiving the votes of thirty-six individuals specified in his memorial who were, at the time of his election, students of the Theological Seminary at Princeton, N.J., and of five who were students in the College of New Jersey, at Princeton, and all in the Third Congressional district, which were unlawful votes, and ought to be rejected, because, although the above-named students were living at Princeton for the time being merely for the purpose of obtaining their education, they were not residents of the district, and could not legally vote at said election.

The committee reported in favor of the legality of the votes of these students, and stated the reasons on which they based their report as follows:

"But it is contended by Mr. Farlee, the contestant, that they were not residents, as contemplated by the Constitution, but students, merely living at Princeton for the purpose of obtaining an education. The depositions of nineteen persons, students of the college and theological seminary, appended to this report and marked 'D,' taken at the instance of Mr. Farlee, the contestant, have been examined, and your committee are of the opinion that they were legal voters. They swear that they were more than 21 years of age; nearly every one swears that he came to Princeton without any intention of returning to the place he came from, and with the intention of remaining there until he accomplished the purpose for which he came either to the college or the theological seminary, and then of going wherever he could find occupation, if he did not find it in Princeton, or wherever he felt it his duty to go.

"It will be observed on reading the depositions that these individuals had all been in Princeton more than one year, and most of them had been there several years before the election; and that although they were in pursuit of an education, either in the college or theological seminary, they had, many of them, been of age and enjoying the privileges of freemen many years."

Here follows, in a report, a synopsis of the depositions of the students, the main features of which disclose a state of facts very similar to the student branch of the present contest.

The House adopted the report of the committee and refused to seat the contestant.

In the case of Putnam *v.* Johnson (10 Mass., 488–502) the court decided the vote to be legal, and in so doing used the following language (p. 500):

"A residence at the college or other seminary for the purpose of instruction would not confer a right to vote in the town where such an institution exists, if the student had not severed himself from his father's control, but resorted to his house as a home and continued under his direction and management. But such residence will give a right to vote to a citizen not under pupilage, notwithstanding it may not be his expectation to remain there forever."

In Fry's election case (71 Pa. Stat., 302), relied on by contestant, it is conclusively admitted as a matter of fact that these students always had a fixed intention to leave the college town. In the very language of the court, they "may or may not return" to their fathers' homes, excluding the idea of abandonment of the old homes and the adoption of new ones.

Contestant quotes copiously from the Allentown election case (Brightly's Digest, 468–479), and says: "It is probably the most complete, exhaustive, and decisive case reported," oblivious of the fact that it is the same case as Fry's election case (71 Pa. Stat.), described by him on the same page (18) of his brief, as "another and very strong case." His quotation shows that the students in that case "are under the pupilage of their parents, receiving all their support from them, and in no sense whatever are they emancipated from the parental domicile."

In Dale *v.* Irwin (78 Ill., 170) the court says:

"The permanent abode prescribed by the Revised Statutes of 1874, as the criterion of residence required to constitute a legal voter does not mean an abode which the party does not intend to abandon at any future time. In the sense of the statute, a permanent abode means nothing more than a domicile, a home which the party is at liberty to leave as interest or whim may dictate, but without any present intention to change it.

"The undergraduates of a college, who are free from parental control, and regard the place where the college is situated as their homes, having no other to which to return in case of sickness or domestic affliction, are as much entitled to vote as any other resident of the town pursuing his usual avocation. It is pro hac vice the home of such students, the permanent abode in the sense of the statute."

After a full consideration of the merits of each particular vote in question the court admitted a part of the student votes as legal and rejected a part as illegal on the principle announced in the case that the legality of each vote must be determined by the facts relating to it alone.

In the case of Cessna *v.* Myers (McCrary on Elections, 496, Forty-second Congress), involving student votes, the committee, speaking of evidence, says:

"It is often a question of intention. If a person has actually removed to another place with an intention of remaining there for an indefinite time, and as a place of present domicile, it becomes his place of domicile, notwithstanding he may have a floating intention to go back at some future period. A fortiori would then be true if his floating intention were to go elsewhere in future, and not to go back, as in such case the abandonment of his former home would be complete.

"The fact that the citizen came into the place where he claimed a residence for the sole purpose of pursuing his studies at a school or college situate there, and has no design of remaining there after his studies terminate, is not necessarily inconsistent with a legal residence in such place. This is to be determined by all the circumstances of each case."

In the opinion of the judges (5 Metcalfe, 587) the following language is used:

"But if, having a father and mother, they should remove to the town where the college is situated, and he should remain a member of the family of the parent, or if having no parent, or being separated from his father's family, not being maintained or supported by him, or if he has a family of his own and removes with them to such town, or by purchase or lease takes up his permanent abode there, without intending to return to his former domicile, if he depends on his own property, income, or industry for his support; these are circumstances, more or less conclusive, to show a changed domicile, and the acquisition of a domicile in the town where the college is situated. We do not consider this circumstance (i.e., 'having means of support from some place elsewhere') of much importance in determining the domicile. If, indeed, a young man, over 21 years of age, is still supported by his father or mother, it is a circumstance concurring with other proofs to show that he is still a member of the family of such parent,

and so may bear on the question of domicile. But if he is emancipated from his father's family and independent in his means of support, it is immaterial from what place his means of support are derived."

In Cushing's Election Case (p. 437) the committee on the judiciary of the legislature says that a right of a student, or of other persons, to vote is a constitutional right qualified only by the constitutional requirement of age and residence. "He has the same right to employ himself in obtaining a literary education as in learning or exercising a trade, an art, a profession, or agricultural pursuits."

The minority views, presented by Mr. S. H. Miller, of Pennsylvania, took issue with the position of the majority:

It is claimed "that a student must prove his domicile of origin to have been abandoned." This is not the law." The vote having been received by the election officers, the burden is on the other side to show that they erred." (Cessna *v.* Myers, McCrary, p. 501; Letcher *v.* Moore, Election Cases, p. 829; Botts *v.* Jones, Election Cases, p. 74; Contested Election Cases, vol. 5, p. 79; Contested Election Cases, vol. 3, p. 407.)

It is claimed that the students in Xenia and Lebanon did not work the roads nor pay poll tax. Neither did any other citizen, the care of the streets in both of these corporations being provided for out of the corporation funds. At Wilberforce the colored students worked the roads with quite as much regularity as other people, as many as twelve ministers offering to work, but being excused, under the impression of the supervisor that they were exempt. But whatever the fact be, there is no such prerequisite to voting in Ohio.

It is clear from the authorities cited that persons whose occupation is that of student, teacher, or preacher have the name right to change their residence as people pursuing other occupations and that their place of residence must be determined by the same rules which are prescribed by the legislature of Ohio for all the people of the State.

The case of Mickey *v.* Loomis, recently decided in the Ohio senate, is much relied on to show the illegality of student votes in Ohio. The agreed state of facts in that case is much less favorable to the students than the facts in this case. They were not self-supporting, as in this case. They came to college directly from their parents' homes and had not been out in the world for years, as in this case. They were not teachers, preachers, etc., and of the average age of 27 years, as in this case, and yet even they were clearly legal voters. The elections committee in that case consisted of five Democrats to two Republicans. The vote against the students was five to two in the committee, and in the senate it divided exactly on party lines. It can hardly be accepted to overthrow four cases (and the only cases) in this House in favor of the legality of such votes.

THE COLORED VOTERS OF WILBERFORCE; XENIA TOWNSHIP.

It is claimed that 28 students of Wilberforce voted for contestant.

The town of Wilberforce and Wilberforce College and Academic and Theological School for colored people are situated in Xenia Township. It is a settlement of colored people, and is surrounded by colored settlements on every hand. In Greene County alone there are several thousand colored inhabitants, while in Greene and in the adjoining counties of Clarke and Clinton is one-fourth part of the entire colored population of the State. The men who voted at Xenia Township who were students at Wilberforce were but 28 in number of all the students in that great university. They were men advanced in years, far beyond the age of majority. Their average age when they voted was 29 years—running all the way from 23 to 35 years. They had lived at Wilberforce, respectively, from one to five years. They were all self-supporting, and had been engaged in useful, productive occupations, such as laboring, teaching, preaching, etc. At the time of the election, October 10, 1882, twelve of these men were licensed preachers, with settled charges at Wilberforce and at the neighboring colored settlements. Most of their parents were dead. All of them had for years been away from the early family hearthstone and from under the parental roof. One of them, a type of them all in most of the facts which distinguish him, was born a slave. He left his home in North Carolina in 1869, without education and poor in purse. He labored on the railroads in Tennessee and Kentucky; lived at Evansville and Terre Haute; voting at both places, and in 1876 settled in the town of Wilberforce, where he has ever since lived and where he has voted at every election for five years prior to October 10, 1882, except at one election, when he had charge of a church in another county in Ohio. Eighteen of these voters had voted at previous elections in Xenia

Township; five of them at eight previous elections at least; eight of them at three or four previous elections; five of them at two previous elections.

A brief statement of each case and the testimony supporting the same will be found in Appendix H to minority report. The object of the law is not to disfranchise, but to enfranchise. There was no place in the world where these men could lawfully vote on October 10, 1982, except at Xenia Township, where they did vote and where many of them had been voting for years. Their abandonment of all former houses was complete and their adoption of Xenia Township manifest.

THE THEOLOGICAL STUDENTS.

Of all the students at the theological seminary, Xenia, twelve only voted for contestee. They, too, were men advanced in years far beyond the age of majority, their average at the time of election being over 26 years. They had all completed their academic education, had been attached to presbyteries, and had become in fact a part of the clergy of their church. They were in nearly every instance poor men, who had been compelled since their majority to become teachers or engage in other industrial pursuits for their own sustenance and support. Of those who were interrogated on that point two had voted there at five previous elections; five had voted there at three previous elections; one had voted there at one previous election. Their uncontradicted testimony is that they had abandoned their former homes and had adopted Xenia as their residence, without any present intention of removing therefrom. They, like all preachers, were subject to go where the exigencies of their profession might call them. It has always been held in Ohio that a minister of the Gospel is entitled to vote where he has resided for the statutory period, notwithstanding he may move the next year to take another charge. Much stress is laid upon the fact that these students signed a college register, giving their addresses and the presbyteries to which they were credited. All the witnesses testify that the address merely indicates where the student came from, and in no sense indicates residence, and that the giving the name of the presbytery is merely for the information of the officers of the college, that they may know what body has jurisdiction over his spiritual walk and conduct. Rev. J. G. Corson, the secretary of the board of managers, explains the whole matter. He says:

"The name of the presbytery under the care of which the student is does not indicate anything in regard to his residence, as it is in a great measure a matter of convenience, as, for example, a number of the students coming from distant parts of the country put themselves under the care of Xenia presbytery, in whose bounds the seminary is located, because more convenient for being examined by and delivering discourses before such presbytery."

Much stress is also laid on the fact that several of these men had completed their course at the time they were examined as witnesses. Some of them had appointments to be examined and to deliver their trial discourses before their presbyteries. The law required that they should have five days' previous notice of their examination. They simply asked, in order to avoid delay, that they might be examined at once and go to their presbyteries for that purpose alone. Where they would thereafter make their homes or whether they would ever abandon their homes in Xenia were matters for the future, to be determined by the exigencies of their lives, just as the place of residence is determined in the case of every other voter.

A brief statement of the facts in each case will be found in Appendix H to this report.

THE NORMAL UNIVERSITY.

Contestant claims that 36 students at the National Normal University at Lebanon voted illegally for contestee. These men were mechanics and farmers and teachers; principally the latter. Their ages are from 21 to 31 years. Most of them were advanced far beyond the age of majority; all had been severed from their parental homes and had been out in the world fighting their own battles for years.

At the time of the election the witnesses put the number of students at from 450 to 1,300. The best informed persons say that there were about 300 adult males there at that time. Out of these 300, 36 only voted for contestee—about 1 in 10.

These students did not, as has been claimed, vote in a body, nor as a class. Only such as were qualified by age, residence, and intention to reside there presumed to vote, and this after careful discussion of the requirements for voting. A large number of them had been voting for a number of elections

previous to October 10, 1882. Seven had voted at three previous elections; 8 had voted at one or more previous elections.

The university is not a preparatory school for youth, but it is a school for teachers. It is the headquarters of teachers in Ohio. Many teachers make Lebanon their home because the university is there. From there they go out to teach or follow other occupations as they have opportunity.

Certain other questions as to the qualifications of voters were disposed of:

(1) As to the votes of certain idiots, the majority say:

We find that three hopeless idiots, from the infirmary in Greene County, voted for contestee. They are Berry Valentine, Samuel Scott, and William Morris, and we deduct these votes from contestee's poll. He attacks a number of persons as idiots, lunatics, and imbeciles and claims that they voted for contestant. We find the mental condition of A. M. Apple to be far above the average of voters. We find the following persons to be of fair intellect, to wit: George Robb, Charles Beebe, Warren Lytle, John Killeen, Harlan Duke, Aaron Cosad, William Dill, and William Hawkins. We find the following to be persons of small intelligence, but not idiots, to wit: Noah Potts, David Norris, and Dennis Morris. We might add that there is no testimony to show how some of them voted, nor any to show how the following persons voted, they being very weak-minded, to wit: John H. Nichols, John Kitchel, John Fleck, and Thomas Reiley. The case of Dennis Morris, a man over 80 years of age, merits special notice. He was not a weak-minded person in his prime. His right to vote in his old age is preserved to him by the supreme court of Ohio, which held, in the case of Sinks *v.* Reese (19 Ohio Statutes, 307), that "the vote of a man otherwise qualified, who is neither a lunatic nor an idiot, but whose faculties are simply greatly enfeebled by age, ought not to be rejected."

The minority say:

Idiots and insane persons are excluded from the elective franchise in Ohio by the constitution. By the statute an imbecile is defined to be an idiot, so that the disqualification extends to imbeciles. There are 6 persons of this class who voted for contestant. Two of them have been adjudged by the courts of competent jurisdiction to be idiots; 4 to be insane, and 2 to be imbeciles, and each and all of these 6 were under guardianship, both of their persons and estates, and, by the law of Ohio, their guardians are ex officio guardians of their minor children. They are not competent to exercise any civil or political right.

Upon a careful examination of the testimony in these cases and of the records of the courts, wherein 6 of them have been adjudged insane, idiots, and imbeciles, it clearly appears that the following persons come within the provisions of the constitution and are disqualified to vote; that they voted for contestant; that their 6 votes ought to be deducted from contestant's poll and that number added to contestee', majority: Thomas Reiley, John Fleck, John Killeen, Noah Potts, William Hawkins, Charles Beebe, Warren Lytle, John H. Nichols. A brief statement of the facts in these cases, with testimony bearing on the same, will be found in "Appendix B" to this report.

(2) As to the votes of certain paupers, the majority say:

Certain inmates of the Butler County Infirmary voted. They had a right to do so, as there is no pretense that they voted through any intimidation. There is no testimony to show how any of them voted. None were called as witnesses. Their rights are guaranteed by the supreme court of Ohio, which held, in Sturgeon *v.* Korte (34 Ohio Statutes, 525), that—

"(1) An inmate of a county infirmary who has adopted the township in which the infirmary is situated as his place of residence, having no family elsewhere, and who possesses the other qualifications required by law, is entitled to vote in the township in which said infirmary is situated.

"(2) Such inmate is not under such legal restraint as to incapacitate him from adopting the township in which the infirmary is situated as his place of residence."

We can see no grounds for the claim that 17 votes should be deducted from contestant on this account.

The minority say:

Thirty-one inmates voted, Nos. 9, 13, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 70, 71, 93, 126, 215, in the poll book; they were, with a few exceptions, taken to the polls in the infirmary wagon; all but five were admitted from other townships than Fairfield, wherein the infirmary is situated. One, George Leonard, came from Lemon Township, October 4, 1882, only six days prior to the election. His vote was illegal for that reason alone. The legal residence of a pauper is the place from which he entered the almshouse. (McCrary on Elections, 42; Paine *v.* Town of Durham, 29 Ill., 125; Freeport *v.* Supervisors, 41 Ill., 41.) The same rule is adhered to in Sturgeon *v.* Korte (34 Ohio, 525–537).

The court found, however, "that while such inmates they severally did adopt said Falls Township (where the infirmary was situated) as their permanent residence, and by such act of adoption and selection and not otherwise did change their residence." It was claimed that an inmate was under such restraint as to be incapacitated "from forming a purpose or intent to change his residence."

The court was in doubt even on this question, and said: "While the question is not free from doubt, we incline to think he is not" [incapacitated].

Contestant did not attempt to show that either of these inmates from other townships did even "select or adopt" Fairfield Township (where the infirmary is situated) as their residence.

The law conclusively fixes their residence at the places from which they were received into the infirmary. Here, then, are 26 illegal votes.

(3) The minority, claiming that the votes of the paupers should be deducted, propose that it be done on evidence as follows:

Mr. Ross, the Democratic superintendent, swears to giving them tickets—20 Democratic and 3 Republican. Taking the view most favorable to contestant, we will suppose that he gave 5 Democratic tickets to the five inmates who lived in Fairfield Township; that would leave 15 Democratic and 3 Republican tickets voted by nonresident inmates, leaving it in doubt as to how the eight other nonresident inmates voted; charge the 15 Democratic ballots to contestant, and the 3 Republican ballots to contestee, and divide the eight remaining votes between contestant and contestee according to the vote received by each in the precinct, and we find contestant's net loss on the infirmary vote to be 17 votes. Upon every principle of law these 17 votes must be deducted from contestant's poll, and that number be added to contestee's majority in the admitted case.

The majority in the debate [1] vigorously combated the proposition that the distribution of the tickets under the conditions stated was evidence sufficient to determine how the persons voted.

(4) The majority report thus decides a question of domicile:

John Estel was attacked because he voted in a precinct where he lived apart from his wife. The testimony is that he had been separated from her for many years.

The rule of law, that a man whose wife has abandoned him can and does acquire a domicile other than hers, is too well known to be elaborately cited. In addition to this, nobody pretends to say that Estel voted for contestant.

(5) Another question of domicile is thus disposed of by the majority:

Michael O'Gara and P. J. Cook were journeymen mechanics; they belong to that class of laborers who are always recognized as having a home in the precinct where they have lived the statutory time. As far back as 1833, in the case of Letcher *v.* Moore, the House decided to admit "the votes of journeymen mechanics, and all other laborers having no fixed and settled residence, but remaining for the time where they could get employment."

(6) A question relating to voting out of the precinct was determined:

Newton Long and G. W. Turner were also attacked by contestee, and their cases are peculiar. The townships of Madison, in Butler County, and Stonelick, in Clermont County, are each divided into two

[1] Record, pp. 5406, 5407.

voting precincts. The law requires the three trustees of the township to act as judges of the election, but provides for dividing them between the precincts when there is more than one. The statute reads:

"In every township containing more than one election precinct each trustee shall act as judge in the precinct in which he resides unless they all reside in the same precinct, when two only can so act therein, and the other trustee shall act as judge in any other precinct."

In Stonelick Township, G. W. Turner, being a judge at the precinct at which he did not live, went over into his own precinct and voted. In Madison Township, however, Newton Long was obliged to sit all day as a judge in the precinct in which he did not live, and voted there. We think there is no provision authorizing him to vote outside of the precinct in which he lived, and that this vote should be deducted from contestant. It is clear, however, that Turner's vote was cast at the right place.

992. The election case of Campbell v. Morey, continued.

As to what constitutes the determination of result on which the serving of a notice of contest is predicated.

The admission to naturalization being the function of a judge, a performance of this function by a clerk is void.

The exact size of the ballot is immaterial.

As to ballots in language other than the English.

The House deducted an excess of ballots proportionately, although the State law did not justify bringing them into the count.

A ruling that the law prohibiting a distinguishing mark on a ballot did not apply to pencilings; by the voter himself.

Ballots spelled wrong or lacking the initials were counted.

The writing of the name of a candidate for a State office beneath the name of the candidate for Congress was held not to render uncertain the intent of the voter.

The House corrected the ballot of a voter shown to have been deceived into voting otherwise than he intended.

Certain other questions were discussed, as follows:

(*a*) As to notice of contest, the majority held:

Contestant served notice of contest on the 11th of January, 1883. The law is that—

"Within thirty days after the result of the election in a district has been determined by the proper authority the contestant must serve the returned Member with notice of contest. * * * It is no doubt true that for the purpose of fixing the time when the thirty days begins to run there must be not only a decision but a promulgation of the result."

The decision and promulgation of the result were, in our opinion, both made December 14, 1882, which is less than thirty days before notice was served. Such is the date of the official record of that decision. Contestee having disputed the date of the finding, signing, and promulgating of the foregoing decision, contestant called witnesses to sustain the accuracy of the record, but no witness was called to impeach it. George K. Nash, then attorney-general, and now a judge in Ohio, was a member of that canvassing board, and testified as follows:

"Upon the afternoon of the 14th the court adjourned until the 2d of January, 1883, without passing upon the motion in the mandamus proceeding. When the action of the court was made known to the board it signed the abstract and certificate now on file in the office of the secretary of state. This signing, as I have before indicated, took place on the 14th of December, 1882."

Alexis Cope, chief clerk to the secretary of state, was called, and testified as follows:

"Q. Third. State who made out or prepared the abstract and finding made by the State canvassing board of Ohio in December, 1882, of the election held October 10, 1882, and when the same was so made out and prepared.—A. I made out the abstract and findings and certificate attached thereto under the direction of the board. The abstract, I think, was completed on the 7th; the certificate

of the findings, according to my recollection, in the form in which it now appears, was not completed until the 14th, the day on which I recollect it was signed."

There is nothing whatever in law or fact to justify contestee's allegation that notice of contest was not served within the required time.

(*b*) Contestant denied the sufficiency of certain naturalization papers on the ground that they were not issued by the judge of the probate court, but by the deputy clerk thereof. The majority say:

The function of deciding whether an alien has proven his claim to be admitted to citizenship must be exercised by the judge only, and if exercised by any other officer of the court the judgment rendered is void; but the judicial function extends no further. The execution of the certificate, the swearing of witnesses, and even the examination of witnesses, if in the presence of the judge who is hearing and deciding the cause, may all be done by the clerk, and are merely ministerial duties. The leading case is Re Cristern et al. (43 Superior Court, New York, 523), in which it is held that when the judge delivers the examination papers to the clerk the judicial function is completed, and the subsequent acts, such as issuing and filing papers, are ministerial only, the allowance is the judgment itself; and that no journal record need be made nor entry in a book.

The minority agree as to the law, but disagree as to facts:

In Ohio the probate court only is provided with records for the admission of aliens to citizenship. The probate judge is ex officio his own clerk and is entitled to a deputy clerk. It is further admitted by contestant in his brief that the admitting of an alien to citizenship is a judicial function, which can only be performed by the judge, and that papers granted on a hearing by the deputy clerk are void.

(*c*) As to the sufficiency of a certain ballot the majority rules:

In the Fifth Ward of Hamilton a written ballot, in the Spanish language, of the uniform width of 2⅞ inches, was voted for contestee. The law of Ohio is that a ballot shall be "not more than two and one-half nor less than two and three-eighths inches wide." The exact size of a ballot has been held to be immaterial. The law is laid down thus in McCrary on Elections (p. 347):

"The supreme court of California has very recently had occasion to consider the force and effect of a statute regulating the size and form of ballots, the kind of paper to be used, the kind of type to be used in printing them, etc. The court held, and we think upon the soundest reason, that as to those things over which the voter has control the law is mandatory, and that as to such things as are not under his control it should be held to be directory only."

We consider this ballot to have been properly counted.

The minority say:

Contestant claims that there was a ballot in the Spanish language, which was a little more than 2⅕ inches wide, was cast for contestee in the Third Ward, and that it is illegal. We submit that this is a substantial compliance with the law of Ohio, and as such the ballot is legal. If it is not, then a large number of German ballots for contestant in the same ward of unlawful width are in the record and must be deducted from his poll.

(*d*) The majority rules against the contestant on a question of the width of certain ballots:

Contestant claims that 49 ballots which were voted for contestee in Sugar Creek precinct (and which are attached to the manuscript testimony in this case) are unlawful under the laws of Ohio. They were cut off close to the name of a candidate on said ticket, and no space was left to scratch or alter the ticket, as provided in the following section of the statute:

"SEC. 2948. All ballots shall be written on plain white paper, or printed with black ink with a space of not less than one-fifth of an inch between each name, * * * and it shall be unlawful for any person to print, for distribution at the polls, or distribute to any elector, or vote any ballot printed or written contrary to the provisions hereof; but this section shall not be considered to prohibit the erasure, correction, or insertion of any name, by pencil mark, or with ink, upon the face of the printed ballot."

The object of leaving a blank space of the fifth part of an inch was to provide for changing the ballot,

as named in the latter part of the section, and it is claimed that any printed ballot without such space can not be lawfully voted or counted. Such is the claim made by contestant in his brief, but as a mere legal proposition only. In his oral argument he disclaimed any desire to have these ballots deducted from contestee's poll. He puts this disclaimer on the ground that, while in his judgment the ballots are unlawful, yet he does not desire to disfranchise any voter on account of a technicality over which the voter himself had no control, We agree with him that, whatever may be the effect of this on other candidates on said ballots, the question involved does not properly arise here.

(*e*) A question arose as to an excess of ballots, the majority saying:

The law of Ohio provides for tallying only as many ballots as there are names on the poll books, leaving the residue, if any, to be preserved but not counted. The Revised Statutes, section 2957, reads thus:

"SEC. 2957. Any ballots in the box in excess of the number of names on the poll books, together with the ballots strung as aforesaid, shall be deposited in the box."

The design is to preserve but not to string or tally the excessive ballots. However, the judges did string and count them in several precincts, as follows:

Precinct.	Number.
Oxford, Butler County	2
North Madison, Butler County	1
Fourth Ward, Xenia, Greene County	4
Fifth Ward, Xenia, Greene County	1
Franklin Warren County	3
Total	11

Desiring to dispose of this excess equitably, the following table is prepared in conformity to the rule laid down in the People *against* Cicott (16 Mich., 283), where the court held that "the adoption of the principle of allotment is the most sensible and practical measure which could be devised," and in the syllabus they lay down the rule of allotment as follows:

"When ballots are found in any ward or township in excess of the names on the poll book, and the inspectors fail to draw them out, as required by section 62, Comp. L, they should, on the trial of the cause, be so apportioned that each candidate shall have deducted a share of them, proportioned according to the whole number of votes in his favor, the probability being that the legal and illegal votes have been cast ratably for the several candidates."

The majority therefore found a net loss of 3 votes for contestee.

The minority contend that the Michigan authority was predicated on an entirely different statute. In Michigan it was the duty of the election officers before proceeding to canvass the votes, if the number of ballots exceeded the number of names on the poll lists, to draw out and destroy unopened a number of ballots equal to the excess. But if the election officers failed to destroy, such excessive ballots, and counted and returned them, their loss on a contest must be determined by allotment, because the ballots which would have been drawn out and destroyed could not be identified. There was no such difficulty about the Ohio law. The ballots last found in the box in excess of the names on the poll lists were by law deemed fraudulent, and they could always be identified whether they were counted and strung or not.

(*f*) As to certain marked ballots: The law of Ohio provided that ballots should be "without any mark or device by which one ticket may be distinguished from another, except the words at the head of each."

The majority say:

The object of this statute was to guard against frauds upon the voter.

And therefore the majority hold that ballots pencil marked by the voters themselves, who voted them, after being printed and distributed according to statutory requirement, did not fall within the requirements of the statute.

The minority contended that the object of this statute was to preserve the secrecy of the ballot, and that the ballots in question should be rejected because it was shown that the voters marked them to let their employers or party friends know how they voted.

(*g*) One ballot was found with sitting Member's name written "W. R. Moorey" and another simply "Morey." Also, there were other ballots where the candidates' names were spelled wrong. All these were counted.

On several ballots a name similar to the name of a candidate for sheriff was written beneath the name of the candidate for Representative to Congress. The majority say:

> We think these ballots ought not to be disturbed for the reason that William McLain was a candidate for sheriff at said election, and the voters, when writing the names on said ballots, merely erred in putting some in the wrong place thereon. There is no doubt as to the intention of the voters to be gathered by inspection of the ballots. We follow the rule laid down by contestee himself in these words:
>
> "The intention of the voter ought to prevail whenever it can be ascertained by an inspection of the ballot, and if the ballot is ambiguous the intention of the voter may be shown.

(*h*) As to a deceived voter the majority hold:

> Robert Wilson voted for contestee in Ross precinct under the supposition that he was voting for contestant, having been deceived by a Republican who gave him the ballot. His vote should be deducted from the poll of contestee and added to that of contestant.

In accordance with their conclusions of law, and also certain conclusions as to questions of fact, the majority of the committee found for contestant a majority of 44 votes, and reported resolutions declaring him entitled to the seat.

The report was debated at length on June 19 and 20,[1] and on the latter day the proposition of the minority, confirming the title of sitting Member was disagreed to, yeas 62, nays 139.

Then the resolutions reported by the majority were agreed to without division.

Mr. Campbell then appeared and took the oath.

993. The Virginia election case of Massey v. Wise, in the Forty-eighth Congress.

Where a capitation tax is a prerequisite to the right to vote, the collection of such tax by unauthorized agents should not invalidate the vote.

A Member who was appointed to assist a United States attorney in certain cases was held not to be disqualified as a Member of the House.

Discussion as to what constitutes "a person holding office under the United States," within the meaning of the Constitution.

On June 30, 1884,[2] Mr. Mortimer F. Elliott, of Pennsylvania, from the Committee on Elections, submitted the report of the majority of the committee in the Virginia case of Massey *v.* Wise.

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[1] Record, pp. 5371, 5404–5426; Journal, pp. 1486, 1497, 1499.

[2] First session Forty-eighth Congress, House Report No. 2024; Mobley, p. 365.

The sitting Member had been returned by a majority of 5,808 votes; but contestant claimed that sitting Member received many illegal votes, and also that he was disqualified.

(1) As to the illegal votes:

The law of Virginia provided for the payment of a capitation tax of $1 prior to the day of election as a prerequisite to the right of the citizen otherwise qualified to vote. Many thousands of citizens failed to pay the capitation tax to the officers first intrusted with the collection of the same.

A short time prior to the election of 1882 the auditor of public accounts appointed special collectors, who issued capitation-tax receipts to the number of 15,000 or 16,000.

The majority report thus concludes as to this branch of the question:

It is impossible for the committee to state who or how many persons voted on the tax receipts, as the evidence utterly fails to show these facts. We are satisfied, however, that several thousand votes were cast upon these receipts, and probably a greater number than contestee's returned majority.

We are of opinion that the votes cast on receipts issued by the tax collectors appointed by the auditor of public accounts, which were paid for by the voters or other persons for them prior to the day of election, were legal votes, and were properly received and counted by the election officers.

It may be doubted whether the auditor of public accounts had authority to appoint these collectors under section 29 of the revenue laws of Virginia. It was his duty, however, to supervise the collection of the delinquent personal and capitation taxes certified to him by the respective county clerks, and under the law to place them in the hands of one or more sheriffs, sergeants, constables, or collectors for such purpose; and if, as it is contended by the contestant, he was not authorized to select private persons as collectors, still we think such persons so appointed to receive the delinquent taxes were acting under color of office, and the taxpayers were not bound, at the peril of losing their votes, to know whether the auditor had exceeded his powers in appointing them. The purpose of the law was to compel the payment of the tax, and that was accomplished and the money reached the treasury through these collectors, the accredited agents of the auditor, and to hold that the citizens who endeavored to qualify themselves to vote by paying the taxes assessed against them to the persons who were held out to them as proper and lawful collectors by the head of the revenue department of the State would be establishing a rule manifestly unjust.

The minority views, presented by Mr. Henry G. Turner, of Georgia, say on this point:

We do not believe that the section of the State statute (sec. 29) under which these appointments were made (and cited in the report of the majority) created such officers or authorized their appointment. If collectors of arrears of taxes had been appointed under section 34 of the same statute, with the approval of the governor, there would have been good reason to think that the auditor could have placed the lists of delinquent capitation taxes in their hands for collection.

But we concede that the tax system of Virginia, taken as a whole, is somewhat obscure, and we will not under the circumstances reverse the decision of that department of the State government which is charged with its administration. The practice of making these special appointments seems to have been inaugurated by the contestant while auditor of public accounts of the State; and while we do not think that the principle of estoppel applies, we admit that this circumstance would greatly embarrass a decision on this point in favor of contestant.

There can be no doubt that many capitation tax receipts were issued in blank, that many were issued on the day of election, and that many were issued in gross and then distributed. And it is claimed, with much force, that any payment of taxes for delinquent voters without their authority previously given, especially when made by political agencies, approximates bribery. But we can not say that the evidence is clear that a sufficient number of votes, illegal for any cause, were cast for the sitting Member to justify the rejection of his majority. We therefore forbear to pursue these painful details.

(2) As to alleged disqualification, the majority report says:

It is claimed by the counsel for the contestant that if the contestee was duly elected that he has since disqualified himself from holding the office of Representative in Congress.

Article I, section 6, last clause, Constitution of the United States, is as follows:

"And no person holding an office under the United States shall be a Member of either House during his continuance in office."

It is claimed by contestant that the contestee, after his term of office commenced, we appointed by the Attorney-General to an office under the United States, which he continued to hold until after he was sworn as a Member of the House.

There is nothing in the record to show the facts alleged, and all the committee had before them was the admissions made by the contestee during the argument of the case. He stated that on the 5th day of March, 1883, he was employed by the Hon. Benjamin Harris Brewster, Attorney-General of the United States, to assist the United States district attorney of Virginia in the trial of certain enumerated cases then pending in the United States district court of Virginia; that the cases had not all been disposed of at the time this case was argued before the committee, and that he expected to assist in the trial of the case then undisposed of when they should come on to be heard. The contestee, by his agreement with the Attorney-General, was to receive for his services as special counsel in said cases not less than $500 nor more than $1,000, as the Attorney-General should afterwards determine.

Under these facts, admitted by the contestee, was the contestee appointed to an office under the United States, and did he hold such office at the time he took his seat as a Member of this House?

The contestee was employed by the Attorney-General under section 363 of the Revised Statutes, which is as follows:

"The Attorney-General shall, whenever in his opinion the public interest requires it, employ and retain in the name of the United States such attorneys and counselors at law as he may think necessary to assist the district attorneys in the discharge of their duties, and shall stipulate with such assistant attorney and counselor the amounts of compensation, and shall have supervision of their conduct and proceedings."

What authority is given the Attorney-General by the section quoted? We think the section so plain that it construes itself. He is authorized, "Whenever in his opinion the public interests require it, to employ and retain," attorneys and counselors at law on behalf of the United States to assist the regular law officers of the Government in the trial of particular cases. The duties of an attorney so employed depend upon the contract made between the Attorney-General and himself, and are not defined by law. He is retained to try a particular cause, and when that service is performed his contract is at an end.

He has no right to perform the general duties of a district attorney, but is confined to such services as the Attorney-General has stipulated for in the contract of hiring. If it had been the purpose of Congress to authorize the Attorney-General to appoint the attorney to an office under the United States, would the words "retain" and "employ" I have been used? Would not the word "appoint" have been used instead? If an attorney employed by the Attorney-General to assist the district attorney in the trial of a single case is an officer of the Government, what is his official name? Is he to be known during the trial of that cause as assistant district attorney and as ex-assistant as soon as the verdict is rendered? Does the office as well as the officer die with the cause the attorney was retained and employed to try? Must it not be a singular office when the compensation to be received by the appointee depends upon a bargain to be made between the Attorney-General and the officer?

The report refers to the Pennsylvania case of Bache *v.* Bums (17 S. and Rawle, 234) and to the decisions of the United States courts in the cases of United States *v.* Hartwell (6 Wallace, 385) and United States *v.* Germaine (99 U. S. Reports, 508).

The last-quoted case was that wherein a United States pension examining surgeon, paid by fees, was held not to be an officer of the United States, because "the duties are not continuing and permanent, and they are occasional and intermittent."

Therefore the majority concluded that sitting Member was not disqualified, and recommended a resolution confirming his title to the seat.

The minority views took issue on this point:

But we feel it to be our duty to inform the House that the sitting Member holds another position which, in our opinion, forfeits his right to a seat. The last clause of the sixth section of the first article of the Constitution is as follows:

"And no person holding any office under the United States shall be a member of either House during his continuance in office."

The precise position of the sitting Member is defined in the two sections of the Revised Statutes of the United States following:

"SEC. 363. The Attorney-General shall, whenever in his opinion the public interest requires it, employ and retain in the name of the United States such attorneys and counselors at law as he may think necessary to assist the district attorneys in the discharge of their duties, and shall stipulate with such assistant attorney and counselor the amount of compensation, and shall have supervision of their conduct and proceedings.

"SEC. 366. Every attorney or counselor who is specially retained under the authority of the Department of Justice to assist in the trial of any cause in which the Government is interested shall receive a commission from the head of such Department as a special assistant to the Attorney-General, or to some one of the district attorneys, as the nature of the appointment may require, and shall take the oath required by law to be taken by the district attorneys, and shall be subject to all the liabilities imposed upon them by law."

Some strew is laid on the words "employ and retain" in the first section cited; but it is respectfully submitted that those words mean no more than the word "appoint" would imply in the same connection. At any rate, they are to be construed in pari materia with the subsequent section. Attorneys or counselors at law occupying the position of Mr. Wise are designated "special assistants to the district attorneys;" they receive a commission (the position is called an "appointment" in the statute); they are required to take the oath prescribed for the district attorneys, which is an oath of office, strictly so called; they are subject to the supervision of the Attorney-General in their conduct and proceeding; they are to assist the district attorneys in the discharge of their duties; they are subject to all the liabilities imposed upon the district attorneys by law, and they are paid out of the Treasury of the United States. This enumeration seems to exhaust the highest badges of office known to us. The power of the Attorney-General to fix the compensation of these special assistants to the district attorneys can not affect the question, except to indicate the possibility of greater subserviency on that account.

The constitutional provision before cited was manifestly intended to exclude from Congress all persons under the official influence of the Executive. It is public policy, solemnly declared in the fundamental law. It is our duty firmly to execute the Constitution according to its plain intent and spirit if we would preserve the independence of Congress.

The cases decided by the courts, while not based on the precise question here raised, confirm by clear analogy, the view we have presented.

We therefore submit the following resolution:

Resolved, That John S. Wise, one of the Members of this House, having continued to hold the office of special assistant to the district attorney of the United States for the eastern district of Virginia after he was qualified as a Member, has thereby forfeited his right to his seat, and that said seat be declared vacant.

The report in this case does not seem to have ever been acted on by the House. Mr. Wise retained his seat, of course.

994. The election case of Botkin v. Maginnis, from Montana Territory, in the Forty-eighth Congress.

No wrong or injury being shown, polling places established without entire adherence to the law were approved.

Instance wherein a law providing method of establishing polling places was construed as directory rather than mandatory.

The mere fact that a voter is a soldier does not necessarily imply disqualification.

On July 5, 1884,[1] Mr. A. A. Ranney, of Massachusetts, from the Committee on Elections, submitted the report of the committee in the case of Botkin *v.* Maginnis, from Montana Territory.

Mr. Maginnis had been returned by an official majority of 1,484 votes. Contestant assailed this majority on several grounds, some involving issues of fact and others of law. The committee, in settling the question, passed on the following:

(1) As to the legality of certain polling places:

The committee concludes that the polling places established in the counties of Custer, Dawson, and Missoula were without authority of law. We regard the statute prescribing that precincts shall be established at the regular meeting immediately preceding the general election to be directory rather than mandatory in its character. And following the familiar rule in such cases, we do not hesitate to say that their designation at another time, in the interest of a free and convenient ballot, was such an exercise of power as the commissioners might well indulge in. However this may be, the committee do not find that there was any wrong or injury done, or that there was any fraud in the matter.

The statute referred to is as follows:

SEC. 5. It shall be the duty of the commissioners of the several counties, at their regular session immediately preceding said general election, to appoint three discreet and capable persons possessing the qualifications of electors to act as judges of election in each township or precinct; and said board shall designate one or more of said judges, whose duty it shall be to post up or cause to be posted up in each precinct or township, notices of election in the manner hereinafter provided. Said board of commissioners shall also set off and establish at said meeting townships or precincts when the same my be necessary. And the clerk of said board shall make out and forward by mail, immediately after the appointment of said judges, a notice thereof in writing directed to each of said judges so appointed. In case there shall be no post-office in any one or more of the townships or precincts in any county, then in that event the clerk shall forward notices of such appointment by mail to the post-office nearest to such precinct or township, directed to the judges as aforesaid. If in any of the townships or precincts any of said judges refuse or neglect to serve, the voters of such township or precinct may elect a judge or judges to fill vacancies on the morning of the election to serve at such election.

* * * * * * *

SEC. 14. It shall be lawful for any elector to vote for Delegate to Congress at any place of holding elections in this Territory; and for members of the legislative assembly and all other officers at any place for holding elections within the particular limits for which such member of the legislative assembly and such other officers are to be elected: *Provided,* That an elector qualified to vote for part and not all of the officers to be chosen at any election shall vote an open ballot, and the judges may determine the legality of such vote."

(2) As to the legality of the votes of certain soldiers:

There is some proof tending to show that "soldiers" voted at this election. In the opinion of witnesses these "soldiers" were from 40 to 150 in number. We do not feel that we are justified in presuming that because the contestant and his witnesses have seen fit to designate these persons as soldiers that they are therefore necessarily incompetent as electors.

In his description of them, and of their qualifications as electors, contestant has contented himself with saying they were soldiers. There is no evidence that they were not residents of the Territory; that they had not been residents of the Territory long prior to any enlistment in the United States service, if it is claimed that they were in the United States service—a proposition by no means clear in the light of the proofs. But if it is admitted that they were enlisted men of the United States Army, and are therefore incompetent as electors, the committee are still left in doubt as to how and for whom these incompetent electors cast their ballots.

[1] First session Forty-eighth Congress, House Report No. 2138; Mobley, p. 377.

In conclusion the committee reported this resolution:

Resolved, That Martin Maginnis was duly elected as a Delegate from the Territory of Montana in the Forty-eighth Congress, and is entitled to his seat as such Delegate.

The resolution [1] was agreed to by the House without debate or division.

995. The Alabama election case of Craig v. Shelley, in the Forty-eighth Congress.

Being satisfied by extrinsic evidence that returns rejected by State canvassers for informalities were correct as to the result, the House counted them.

Instance wherein the House unseated a member of the majority party.

On July 5, 1884,[2] Mr. L. H. Davis, of Missouri, from the Committee on Elections, submitted the report of that committee in the Alabama case of Craig *v.* Shelley.

The sitting Member had been returned by an official majority of 2,724 votes over contestant; but this result had been reached by the action of the returning boards in throwing out townships in the district which had returned a total of votes sufficient to change the result. The committee, after reviewing the law of Alabama in regard to elections, say:

The supreme court of Alabama has decided that it is the election that entitles the party to office and if one is legally elected by receiving a majority of legal votes his right is not impaired by any omission or negligence of the managers subsequent to the election. (State, ex rel. Spence, *v.* The Judge of the Ninth Judicial Circuit, 13 Ala. Rep., 805.)

It has further been held that a mistake by the managers of the election in counting the votes and declaring the result will not vitiate the election. Such a mistake may and should be corrected. The person receiving the highest number of votes becomes entitled to the office. (State, ex rel. Thomas, *v.* The Judge of the Circuit Court, 9 Ala. Rep., 338.)

The precincts rejected by the county boards of supervisors were rejected for sundry reasons. The rejection of the precincts in Dallas County, according to the evidence of James S. Diggs, an attorney at law, of Selma, was for the following reasons:

"The voting precincts in Dallas County are numbered from 1 to 36, but by consolidation of some of the beats there are really, I think, but 30. I was present at the count of votes of Dallas County made by the board of supervisors, which board is composed of the probate judge, the clerk of the circuit court, and the sheriff of said county. The board was all present at said count. I think there were either ballot boxes or returns for 23 or 24 of said precincts before said board. I think they only counted the votes from the following precincts, viz: Woodlawn, Valley Creek, Cahaba City, Marion Junction, one of the Lexington boxes, one of the Summerfield boxes, Burnsville. I do not now recollect of any other boxes that were counted. There were 14 or 15 boxes that were rejected or that they refused to count. These boxes are as follows: Plantersville, because the poll list was not signed and there was no statement of the vote in the box; Harrals Crossroads, because there was nothing in the box but a lot of loose ballots; Martins, because it was said that the polls were not opened until after 9 o'clock a.m.; Orrville, because there was no statement of the vote in the box; River, because the names of the inspectors signed to the returns appeared to be in the handwriting of one person; Pine Flat, because the poll list was not signed; Union, because the returns were in an envelope, directed to J.W. Dimmick, and they said they had no authority to open it; Chelatchie, because the poll list was not signed; Browers, because the statement of the vote was not signed by the inspectors; Smyleys, because there was an irregularity in the poll list, and also because the box, which was nailed up and sealed, did not have a lock on it; the box was so securely nailed that it had to be pried open; Elm Bluff, because the statement of the vote was not signed by the inspectors; Bykens, because the poll list was not signed, and

[1] Journal, p. 1701.

[2] First session Forty-eighth Congress, House Report No. 2137; Mobley, p. 373.

because the box, though securely fastened and sealed, had no lock upon it; Mitchells, because the election was not held in the place in which they had been accustomed to hold the election, and because there was some evidence the tickets were numbered before the board."

The precincts rejected in the other counties were for reasons very similar to those in Dallas.

The committee has counted no rejected precinct, except where the evidence of contestant clearly shows that the election was honestly and fairly held. It does not criticise the action of the board of supervisors in the several counties in rejecting these precincts. They were rejected for technical reasons in the main. The committee, holding that mistakes and errors of the election officers in declaring the result and making the returns will not vitiate the election, have corrected or rather overlooked these errors and mistakes when satisfied by extrinsic evidence that the return made, although possibly informal, was correct as to the result. In doing this it has not only followed the precedents established by the House of Representatives, but the decisions of the supreme court of Alabama.

So the committee reported a resolution declaring Mr. Shelley not elected and Mr. Craig entitled to the seat.

After brief debate and without division the resolutions were agreed to on January 8, 1885,[1] and Mr. Craig appeared and took the oath.

Mr. Shelley was a member of the majority party in the House.

996. The Missouri election case of McLean *v.* Broadhead, in the Forty-eighth Congress.

May a registry law establish a qualification as to residence within a ward which the State constitution does not establish?

Should the House defer to a decision of a State court applicable to the case in issue as to its reasoning, but only analagous as to facts?

On February 18, 1885,[2] Mr. Mortimer F. Elliott, of Pennsylvania, from the Committee on Elections, presented the report of the majority of the committee in the Missouri case of McLean *v.* **Broadhead. The sitting, Member had been returned by a majority of 102 votes.**

The investigation of the contest involved the settlement of several questions of fact, and the following question of law:

The only other claim made by the contestant which can possibly affect the result in this case is that 50 legal voters who offered their ballots at their proper polling places, which ballots contained contestant's name for Congress, were denied the privilege of voting because their names were not found on the lists furnished the judges and clerks in the respective precincts; their names having been illegally and improperly stricken off the registration list.

We have stated the position of the contestant upon this question in almost the exact language of his brief.

The constitution of Missouri, adopted in 1875, article 8, section 5, provides as follows:

"The general assembly shall provide by law for the registration of all voters in cities and counties having over 100,000 inhabitants, and may provide for such registration in cities having a population exceeding 25,000 and not exceeding 100,000, but not otherwise."

The city of St. Louis, in which the Ninth Congressional district is located, had, at the time of the adoption of the constitution of 1875, a population of more than 100,000.

In 1881 the general assembly of Missouri passed a registry law, the first two sections of which are as follows:

"SECTION 1. There shall be a registration of all the qualified voters in cities having a population of 100,000 inhabitants or more, which registration shall be had under the provisions of this act, and not otherwise.

"SEC. 2. Every male citizen of the United States, and every person of foreign birth who may have declared his intention to become a citizen of the United States, according to law, not less than one year

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[1] Second session Forty-eighth Congress, Journal, p. 206; Record, pp. 555, 556.

[2] Second session Forty-eighth Congress, House Report No. 2613; Mobley, p. 383.

nor more than five years before he offers to vote, who is over the age of 21 years, who has resided in this State one year next preceeding the election at which he offers to vote, and during the last sixty days of that time shall have resided in the city, and during the last ten days of that time in the ward at which he offers to vote, who has not been convicted of bribery, perjury, or other infamous crime, nor directly interested in any bet or wager depending upon the result of the election, nor serving at the time in the regular Army or Navy of the United States, shall be entitled to vote at such election for all officers, State or municipal, made elective by the people, or at any other election held in pursuance of the laws of this State; but he shall not vote elsewhere than in the election precinct where his name is registered and whereof he is registered as a resident."

The constitution required the general assembly to pass a registry law. The legislature obeyed the command of the constitution, and to enforce its provisions provided that the citizen should "not vote elsewhere than in the election precinct where his name is registered, and whereof he is registered as a resident."

There is no misunderstanding this provision of the law. No citizen, although otherwise qualified, has the right to vote unless at the time he offers his ballot he is properly registered at the precinct where he resides. It may be said that the general assembly exceeded its power when it imposed the penalty of temporary disfranchisement upon the citizen for omitting to be registered in the manner and within the time limited by the provisions of said law.

The constitution commands the general assembly to enact a registry law, and in order to compel obedience to the law the legislature clearly had the right to say that the failure to register should be conclusive evidence that such person was not a legal voter.

Registration is not a qualification, but is made the necessary evidence that the person offering to vote possesses the qualifications prescribed by the constitution of Missouri.

The legislature, we think, had the right to go that far under the mandatory provisions of the constitution of Missouri requiring the passage of a registry law.

Without such a provision the registry law would be a nullity. If a person offering to vote is allowed to make proof at the polls that he possesses all the qualifications of an elector, then the registry law affords no protection against fraud and false swearing. Even if the board received the ballots of persons who were not registered, and such persons possessed all the qualifications of electors prescribed by the constitution, such votes should not be counted.

The majority call attention to the Pennsylvania case of Martin McDonough (Legal Intelligencer, vol. 41, p. 234), and then say:

It is not necessary in this report to go into the details of the registration law. It is sufficient to state that the registration is not completed until five days prior to the election, the board of revision being required to sit until that time for the purpose of striking off and also restoring names improperly stricken off by said board.

The recorder of votes is required on the day prior to the election to deliver to the judges of election two copies of the corrected registration lists of their respective precincts alphabetically arranged, together with a copy of the law regulating elections.

These lists were furnished the judges at the election out of which this contest arises.

Of the 50 persons who it is alleged offered to vote, and, if they had been permitted to do so, would have voted for the contestant, not more than 6 were on the lists furnished the judges of election, and there is no evidence that they were on the original registry list after the board of revision had concluded its labors. These lists were required to be furnished for the guidance of the election officers, and they are presumed to be correct until the contrary is shown by competent testimony. The only competent evidence to prove the incorrectness of these lists is the original registration from which they were taken. There has been no effort to put in evidence the registration as it stood five days prior to the election, the time when the power of the board of revision over it ceased.

The evidence before the committee thus shows that only 6 of those 50 persons were registered, and as they were not registered their votes were properly rejected, and can not now be counted for the contestant.

After a somewhat careful consideration of the case, we have reached the conclusion that James O. Broadhead, the sitting Member, was duly elected.

The minority views, presented by Mr. Alphonso Hart, of Ohio, took issue with the position of the majority:

The constitution of Missouri has the following provision upon the subject of the election franchise:

"ARTICLE VIII.

SEC. 2. Every male citizen of the United States, and every male person of foreign birth, who may have declared his intention to become a citizen of the United States according to law, not less than one year nor more than five years before he offers to vote, who is over the age of 21 years, possessing the following qualifications, shall be entitled to vote at all elections by the people:

"First. He shall have resided in the State one year immediately preceding the election at which he offers to vote.

"Second. He shall have resided in the county, city, or town where he shall offer to vote at least sixty days immediately preceding the election.

"SEC. 3. All elections by the people shall be by ballot; every ballot voted shall be numbered in the order in which it shall be received, and the number recorded by the election officers on the list of voters, opposite the name of the voter who presents the ballot. The election officers shall be sworn or affirmed not to disclose how any voter shall have voted, unless required to do so as witnesses in a judicial proceeding: *Provided.* That in all cases of contested election the ballots cast may be counted, compared with the list of voters, and examined under such safeguards and regulations as may be prescribed by law.

"SEC. 5. The general assembly shall provide by law for the registration of all voters in cities and counties having over 100,000 inhabitants, and may provide for such registration in cities having a population exceeding 25,000 inhabitants and not exceeding 100,000, but not otherwise."

The provision is explicit and easily understood. The qualifications of a voter are four in number:

(1) He must be a male citizen of the United States. or, if of foreign birth, must have declared his intention to become a citizen of the United States not less than one nor more than five years before he offers to vote.

(2) He must be over the age of 21 years.

(3) He must have resided in the State one year immediately preceding the election.

(4) He must reside in the county, city, or town at least sixty days preceding the election.

The foregoing are all the qualifications named as requisite to the exercise of the elective franchise. The constitution has, however, in sections 8 and 11, denied the right to vote to occupants of poorhouses and persons confined in public prisons, and to all officers, soldiers, and marines in the Regular Army or Navy of the United States. By section 10 it has also provided that the general assembly may enact laws excluding from the right of voting all persons convicted of felony or other infamous crimes or misdemeanors connected with the right of suffrage. The provision in regard to the registry law does not in any manner change these qualifications or prohibitions named in the Constitution.

Suppose the legislature should neglect or refuse to pass any registration act, would that operate to disfranchise all the inhabitants of Missouri? Could no election be held; or, if held, would it be a nullity? Certainly not. It is not in the power of the legislature to deprive any man of the right to vote, provided he possesses the above-named constitutional qualifications and is not included in any of the above named prohibitions. Any law passed by the legislature which in terms or in effect makes any additional requirements, whether it be done under the name of a registry law or not, is to that extent unconstitutional and void. The general assembly can neither add to nor subtract from the constitutional requisites.

After quoting from the registration law, the minority contend that it attempts to add to the qualification of voters, and hold:

The whole registration act is in violation of the constitution, and any registration made under it is an absolute nullity. There is another feature of the statute deserving attention: The law provides that each year, a certain time before the election, a board of revision shall be appointed to examine the registry lists and make corrections of the same. They shall strike from the list, by a majority vote, the names of all persons who have removed or have died, or who, for any reason, are not entitled to registration under the provisions of this act. This revisory board are to execute the unconstitutional

provisions of section 2, and hence their action is based upon and infected with the same infirmity as that of the recorder. Since the hearing of this case before the subcommittee our attention has been called to an opinion delivered by the St. Louis court of appeals on the 13th of May, 1884, upon an appeal from the St. Louis circuit court, in the case of Ewing *v.* Hoblitzell, in which certain portions of the registry law are declared unconstitutional. The particular points which we have discussed were not involved in that case and the judgment of the court was not invoked upon them. The inquiry arose upon another branch of the statute. We are justified, however, in saying that the reasoning of the court in the case referred to, if applied to the statute, would have the effect to invalidate the entire action of the recorder of voters, and also the action of the revisory board. By the charter of St. Louis the power of appointing the recorder of voters, the board of revision, and also the judges and clerks of election is lodged with the mayor. The registration act to which we have referred and the amendments made to it require the appointment of the recorder of voters to be made by the governor, and the judges and clerks of election and board of revision are appointed by the recorder. The court in the case referred to holds that the recorder of voters had no authority to appoint judges and clerks of election, and that the law giving him that right was invalid, as an invasion of the chartered rights of the city of St. Louis and its mayor. The same doctrine would hold good as to the appointment of the recorder of voters. The court also, in the above case, holds that the registry law is invalid for the further reason that it is such special legislation as is prohibited by the constitution of Missouri.

We thereupon submit that the registration law of Missouri is invalid and void.

If, however, we assume that the registration law is a constitutional and valid act, there still remains another important question for consideration: Is the action of the board of revision which is provided for in the law final, or have the judges of election the right to review their proceedings and pass upon the qualifications of voters after the revisory board have acted?

The sitting Member contends that the board of revision is a judicial body, and from its decision there is no appeal, and that there is no redress-from any wrong it may commit. This view is expressly contradicted by the statute itself, for in section 6 it is provided that even though the name of a person offering to vote is upon the registry list, "he may be challenged, and it shall be the duty of the judges of election to try and determine in a summary manner the qualifications of every person challenged; and if they find he is not a voter, then his vote is to be rejected." If the action of the revisory board is not final in the case of men whose names are on the list, why should it be as to men who are not on the list?

After commenting on the manner in which the registry lists were revised and the alleged lack of care and fairness, the minority conclude:

We are of opinion that these votes should have been received by the judges of election, it having been clearly shown that they were legal voters on the 7th of November, 1882, that their names had been upon the registry list, and that they were stricken off or left off by mistake. But one conclusion can be arrived at. All election laws should be construed liberally and in favor of the largest privilege to the voter. Our conclusion upon this branch of the subject is, first, that the entire registration was invalid, being in conflict with the constitution of Missouri; and further, that even admitting its validity, the registration and revision of the registry lists was characterized by fraud and mistake as to the names of at least 35 of the persons whose votes were rejected for want of registration.

Therefore the minority concluded that contestant was elected.

The report was not acted on by the House.

997. The Iowa election case of Frederick v. Wilson, in the Forty-eighth Congress.

The State law providing for preservation of the votes as a record but not for a recount, the House corrected the returns by an unofficial recount which it deemed correct.

As to the sufficiency of a recount which justifies a disregard of the returns of the sworn election officers.

On February 19, 1885,[1] Mr. Risden T. Bennett, of North Carolina, from the Committee on Elections, submitted the report of the majority of the committee in the Iowa case of Frederick *v.* Wilson.

The sitting Member had been declared elected by the State canvassing board by a majority of 23 votes.

The principal issue in the case was as to the validity of certain recounts of votes. The recount in Tama Township, which was one of several, is thus discussed by the majority report:

Contestee criticizes this recount as not having been made pursuant to law. The laws of Iowa in no manner provide for a recounting of the ballots. It simply provides that the clerk shall preserve them until after the time for contesting the election has expired. He is not required to keep them in any box or in any particular way. They are a record with the township clerk. Under the statutes of Iowa and the laws of the United States there is no technical rule surrounding them. The only question before the committee is, Are they the same ballots as cast and what is the correct count? The manner of the recount and the time of the recount are immaterial. These ballots were strung by the judges and left with the township clerk. While contestant's testimony was being taken the township clerk opened the box in the presence of three men and counted the ballots for Representative. All testify, and it is not questioned, that the clerk alone handled the ballots and they were in no manner changed or mutilated. Afterwards the ballots were also brought before the commissioner and publicly counted. Both these recounts agree and give the result before stated.

The clerk who thus examined the ballots was a partisan friend of Wilson and Frederick was not connected with it. The clerk violated no law, as the ballots are not required to be kept secret; manifestly it would be wrong to deprive contestant of this evidence, and the objection to the recount is without weight when it appears that not only were the ballots kept as required by law, but it is conclusively shown that the ballots were not tampered with nor could they have been changed. The election officers of this precinct were all partisan friends of Wilson. A request to have a Democrat appointed on the board was refused.

In this township we attach much importance to the fact that the return upon its face impeaches itself; the 4 votes returned in excess of the ballots actually cast, added to the discrepancy of 5 between the tallies of the two clerks, makes precisely the number changed by the recount. Not only this, but the evidence shows that the count on the night of the election was made under circumstances rendering it highly probable that mistakes occurred. Here again we base our conclusion upon the general evidence, accepting the recount as confirmatory proof. If there was nothing suspicious on the face of the return, and no proof showing the original count incorrect, and fairly showing the recount as giving the actual vote, we should not feel justified in disturbing the official count and return; but, in the light of all the testimony, we have no hesitation in concluding that 9 votes too many were certified up for Wilson, and we on this account deduct 9 votes from him.

The minority views, presented by Mr. S. H. Miller, of Pennsylvania, object to the validity of the recounts:

In Iowa the ballot boxes are left by law with the township clerk, who by law is ex officio a clerk at the election, and they are directed to be placed in some convenient condition for preservation and deposited with the township clerk, who is to keep them until the time is passed for contesting the election of any officer voted for. The law is as follows:

"SEC. 629. One of the poll books containing such returns with the register of election attached thereto, in cases where such register is required by law, shall be delivered to the township clerk and by him filed in his office. The other poll book, with its returns, shall be inclosed, sealed, and superscribed, and delivered by one of the judges of the election within two days to the county auditor, who shall file the same in his office.

[1] Second session Forty-eighth Congress, House Report No. 2623; Mobley, p. 401.

"SEC. 630. When the result of the election is ascertained, the judges shall cause all the ballots, including those rejected, with the tally list, to be placed in some convenient condition for preservation and deposited with the township clerk, who is to keep them until the time is passed which is allowed for contesting the election of any officer voted for."

As contestant can not, under any claim or view, be seated unless by the benefit accruing to him under the alleged recount, we desire to call the attention of the committee to the law governing recounts of ballots, published herewith.

A brief history of these recounts need but be given to stamp them as worthless. What is that history? After the returns of the district were all in and contestee was elected by a small majority, contestant hired agents to secretly go round the district to hunt up the ballot boxes and examine the ballots to see what they showed. One witness, C.W. Stone, in behalf of contestant, admits he was a hired agent, by the day, of contestant. That in two counties alone he opened the boxes of about thirty precincts, without authority of law or color of right, and examined, inspected, and professed to have assisted in counting the ballots. He was twenty-one days engaged in this work without the knowledge of contestee or notice to any friend of his, laying the foundation for this contest. His testimony is found on pages 77 and 78 of the record. This witness is brought in to prove he did not change the ballots, but only touched them with the rubber end of his pencil.

Thomas Stapleton is another hired agent (p. 338). The extent of his area "was Iowa County and some others." He admits freely he handled the ballots.

William A. Palmer (p. 218) was engaged by a Democratic editor to visit Cedar Township, Johnson County. He got the poll book from the ballot box and took it to Iowa City and kept it two weeks. At Highland Township, Tama County, "Mr. Frederick and a man from Gilman came over, "and Cunningham—all friends of contestant—and "Mr. Frederick strung the ballots." (See p. 141.)

There is not a ballot box which, on a recount before the notary who took the testimony, gave an increased majority to contestant or a decreased majority to contestee but what had been previously, opened by unauthorized persons between the official count on the night of election and the recount before the notary. Some of the boxes had been opened as often as three times.

The minority also quote the cases of Kline *v.* Myers, Cook *v.* Cutts, and the textbook of McCrary; and finally concludes:

The issue in this case, as presented by the majority report, is: Will an official count, made by sworn officers immediately upon the closing of the polls, be set aside upon proof that an alleged recount, made by unauthorized persons, including the paid agents of the contestant, and made without the knowledge of contestee, showed a different result from the official count?

To seat the contestant in this case imperils every Member's seat in the future where majority does not exceed 25 votes.

Once establish the precedent that a defeated candidate can hire an agent to open the ballot boxes in the district and tamper with the ballots before a recount is had before the legal authorities in pursuance of law, and no man's election will be safe.

In the language of Judge Cook (quoted from McCrary on Elections, p. 209), a Member of this House, and a member of the Committee on Elections, when he himself was a contestant in the Forty-seventh Congress.

"Before the ballots should be allowed in evidence to overturn the official count and return, it should appear affirmatively that they have been safely kept by the proper custodian; that they have not been exposed to the public or handled by unauthorized persons, and that no opportunity has been given for tampering with them."

Also the minority say:

The majority report gives the seat to contestant wholly and solely upon the grounds of pretended recounts of ballots in ten precincts, and in every instance but two the ballot boxes containing the alleged ballots had been opened by a hired agent of the contestant, hired by the contestant for the express purpose of traveling over the district and having the boxes opened and recounted without the knowledge of the contestee or pretended authority of law.

998. The case of Frederick v. Wilson, continued.

Naturalization by a court whose authority was unquestioned for years was sustained by the House.

As to what is meant by a common-law jurisdiction justifying a court to naturalize aliens under the act of Congress.

A paster which did not cover the name of the rival candidate was yet held to make certain the intent of the voter.

The election officers having received a made-up ballot of which voter had neglected to paste the two parts together, the House declined to overrule the action.

Various other questions were also considered in the determination of the case:

(1) *As* to naturalization:

Contestee attacks votes cast for contestant by men whom contestee claims were not naturalized. The fact is they were for the greater part naturalized in due form by the county court of Iowa. It is claimed that this court did not have jurisdiction to induct aliens to citizenship. It seems this court assumed jurisdiction and did grant naturalization papers in various counties, and these people have voted unquestioned for many years. After patient examination of the laws of Iowa and the decision of courts we are convinced that this court had the jurisdiction, and its action was valid. The authorities concur in this, that the State courts mentioned in the act of Congress as having common-law jurisdiction are such as exercise their powers according to the course of the common law. It was not meant they should have all common-law jurisdiction over every class of subjects, including all civil and criminal matters.

The minority concur in this:

Whether it had jurisdiction or not is a question we do not here pass on. As stated by the majority report:

"It assumed jurisdiction and did grant (some years ago) naturalization papers in various counties, and the persons thus naturalized have voted unquestioned for many years."

We count all these votes for the contestant, Mr. Frederick, amounting to nearly 60 in all.

(2) *As* to a defective ballot the majority hold:

In Marietta Township, Marshall County, a Republican ballot was cast having Frederick's name on a "paster," placed under the words designating the office of Representative, but not so as to cover the name of Wilson; this ballot was not counted for either. We think it should have been counted for Frederick. The same rule must apply here as where the name of one candidate is written and the name of the other is not erased. It is well settled that the name written must be counted and the printed name rejected, because the writing is the last act, and shows the intent of the voter to cast his ballot for the name written.

The minority say:

Here is a claim of one vote by reason of a paster. The paster was above Wilson's name, and of same size print. The judges, not knowing for whom the voter intended to vote, threw out this ballot and counted it for neither. (See Randall's testimony, Rec., p. 116.)

(3) As to another defective ballot the majority report says:

A voter handed in an open ballot consisting of the Democratic State, Congressional, and county ticket, the township being blank; on this he placed a township ticket filled out. The judges received this ticket openly, folded it up, and deposited it in the box without objection; afterwards it was not counted, on the ground that it was a double ballot. This was erroneous. It was not a double ballot; it was one full ballot in two pieces. Had it been pasted together no question would have been raised, but as it was openly received and folded together it was equally clear, and one vote must here be added to contestant.

999. The case of Frederick v. Wilson, continued.

Voters being deceived in casting a ballot not intended by them, the House corrected the error.

A return was corrected on the evidence of the tally list supplemented by oral testimony of an election officer and a recount of ballots.

Instance of obstruction on an election case which forced a compromise as to another matter of legislation.

(4) In Homer Township certain men were induced to vote a ticket containing sitting Member's name by reason of deceptive representations made by supporters of sitting Member. The majority of the committee favor a correction of the result on account of this deception.

The minority deny that the voters were deceived.

(5) The majority report thus discusses certain irregularities:

The State canvassing board, on the 11th day of December, 1882, declared James Wilson elected by a majority of 23 votes, and he was duly commissioned. The county canvassers of Marshall County refused to count the votes from Taylor Township; but it was afterwards irregularly certified to the State board, and by them counted in their canvass, contrary to and in total disregard of an injunction issued by a court of competent jurisdiction at the State capital.

The contestant assails the vote of said township for fraud, and he sets out as badges of the fraud that the ballots were handled and counted by the judges of the election during the progress of the voting some hours before the time for closing the polls; that the secrecy of the ballot was invaded and violated by the judges; and that more votes were cast for him than were counted or returned.

In the count by the State canvassers the contestant was given 8 votes and the contestee 48 from that precinct.

We find that the judges of election at this precinct were guilty of gross and flagrant irregularities. They began to count the votes before the polls were closed. They counted the votes before the hour prescribed by law for counting them was reached, and after they had thus counted, voters to the number of 10 or more voted and in effect were wholly deprived of that secrecy and shield which the law provides for and puts around the ballot. We, however, allow the canvass as made by State board to stand.

(6) As to the relative value of returns and the tally sheet:

In Buckingham Township, Tama County, the returns or certificate gave Mr. Frederick 43 votes in both the books, and in the book retained by the township clerk the tally sheet gave him 43 votes; but in the one sent to the county auditor the tally sheet gave him only 38 votes. The county canvassers disregarded the return before them (which gave him 43 votes) and based their return to the State canvassers on the tally list. This was of itself an error, because, under the laws of Iowa, the return is of higher evidence than the tally sheet. The clerk who kept the tally list which was 5 short testified that he made the mistake of 5 against the contestant, and swears that Frederick received 43 votes.

A recount of the votes by the township officers shows that the contestant received 43 votes. A mere examination of the two returns and the two tally sheets leaves no doubt that he received 43 votes; but when to this we add the testimony of the clerk and the recount the proof is simply overwhelming. We here add 5 votes to those for Frederick.

The majority concluded:

The leading question in the case is this: Will the House, by its constituted agents, go behind all certificates and returns to inquire into and correct all mistakes in elections brought to its notice by a contest legally made?

We submit to the House for adoption the following resolutions:

Resolved, That James Wilson was not elected as a Representative in Congress from the Fifth district of Iowa, and is not entitled to a seat on the floor of this House.

Resolved, That Benjamin T. Frederick was duly elected as a Representative in Congress from the Fifth district of Iowa, and is entitled to be sworn in as a Member of this House.

The minority proposed a resolution confirming the title of sitting Member to the seat.

The report in this case was called up on March 2 and 3, 1885,[1] in the closing hours of the Congress, and consideration was for a time obstructed by the minority. Finally, evidently by a compromise affecting the fate of another question, the report was considered and the resolutions proposed by the majority were agreed to without division or debate.

Mr. Frederick thereupon appeared and took the oath.

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[1] Journal, pp. 745, 746, 807; Record, pp. 2325, 2412, 2565